

TRADE AND JUSTICE

by

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INTRODUCTION

0. The Global Economy in Search of a Polity

(1) It has become a triviality to say and write that the world-economy has become global,⁽¹⁾ that for most of the products and many services, economic competitors are acting on a global market place, and that the elite running this show composes a global village. Concomitantly, we witness a rise of global issues posed to mankind requiring urgent political action. For example, long term environmental menaces such as ozone depletion, climate change or acid rain pose new dangers to human survival requiring cooperation among states ;⁽²⁾ demographic imbalance between North and South should make of economic development one of our priorities ; the recent and dramatic changes in what used to be the Eastern block urgently require that we find means to develop and thus integrate the economies of these countries in the world economy. These are only examples of the many common issues humanity faces, and their seriousness puts the improvement of the international political system high on the agenda.

The problem, in effect, is that while there is an increased need for international cooperation, political action at the international level seems hindered by the very existence of a decentralized international political system divided among states.⁽³⁾ Simultaneously, no state alone is large enough compared to the global economy to have enough structural power⁽⁴⁾ to be able to meaningfully act on it without the cooperation of other states.⁽⁵⁾ Companies and money alike being ever freer to move to wherever they find the best returns, governments are shorn of the power to set the economic rules within their borders, let alone outside them.⁽⁶⁾ Worse, and even though we witnessed encouraging signs of increased international cooperation,⁽⁷⁾ there is a danger to see protectionism and nationalism block the necessary reforms. The fate of the Uruguay Round of negotiations within the framework of the General Agreement on Tariffs and Trade ("GATT") is striking as an example of a lost opportunity to set the foundations of a political system within which costly political action could be decided without the fear that any action decided is unfairly costing more to some than to others because of an underlying tainted trading system.

(2) What we are witnessing is an internationalization of society,⁽⁸⁾ i.e. the spreading over states' borders of the space within which actions by the various actors of such society (mostly states and companies) have an impact on the life of others, at a distance. In particular, the space over

which actions of economic actors have an impact on others is not limited to the territory of their state of origin. The phenomenon of the geographical extension of the impact of micro-economic actors' decisions out of the territory of their state of origin is only a logical implication of the internationalization of markets and companies.⁽⁹⁾ For example, when Japanese car producers compete at home against each other, the social consequences streaming from competition (for example, unemployment of the workforce of the failing competitors) are located in Japan. Japanese may collectively decide that this requires political action, for example under the form of temporary assistance to workers while they are unemployed, but few would advocate that Japanese auto makers should stop competing against each other because this causes unemployment for lousy producers. Competition is painful and hurts losers, but market society is built on it.⁽¹⁰⁾

Societies, be they national, local or international, may decide that they should ease the pain by expressing some form of solidarity (for example, by paying unemployment benefits), but it would be absurd for them to blame competition for the pain it might entail. In an international context however, when Japanese auto makers compete in the United States or in Europe, unemployment rises in those countries, not in Japan. Those who have to contribute for the payment of unemployment benefits are not Japanese (who obviously benefit from rising exports), but Americans or Europeans (who seem to suffer from rising imports). Failing American and European auto producers then

have an interesting alternative to the option of being better at producing cars : instead of stopping Japanese cars with competition and better cars at equivalent prices, they may use their national political system to have it stop the cars at its political borders with tariffs or quotas or like measures. And at this, at least, they have been pretty good recently, forcing consumers to buy their expensive and lousy cars.⁽¹¹⁾

The external effect of the actions of competitors as well as the attempts to win in the political arena what is lost on the market place are not new phenomena. But the intensification of international economic competition exacerbates the issue.

The problem is that protectionism,⁽¹²⁾ this form of use of the political system for sectional interests (here, the ones of American or European car producers), apart from being costly to consumers and to the economy as a whole, undermines the possibility to effectively use the political system for common purposes, at the decentralized level of states, since the state apparatus of institutions is in a sense hijacked by sectional interests in their favor, as well as at the international level, where agreement on principles and rules is difficult as long as such uses of the system of public institutions for private ends remain possible.

(3) The internationalization of competition and of society raises issues therefore both at the international and at the national levels :

(i) At the international level, the international economic institutions, and in particular the GATT, are put under pressure. The problem, broadly speaking, is to maintain the openness of the national economies to the international economy, which is obviously difficult once self-reinforcing protectionist policies tend to be adopted, while preserving the capacity of states to adopt policies and measures. This second issue is directly connected to the issues at the national level.

(ii) At the national level, it is the mere functioning of a market democratic society which is endangered. In democratic market societies, public institutions are instruments to be used to achieve common purposes which can not be attained otherwise. However, with protectionism, the state apparatus is used to provide protection from competition to some sectional interests, while it is only in unusual circumstances that such protection should be provided in a liberal perspective. There are failures and imperfections in the market making it unable to appropriately weight part of the value choices of individuals and which require collective action, possibly under the form of a restriction to the possibility to use some types of competitive means.⁽¹³⁾ Environment, which protection may require a prohibition of some types of production processes, for example, is a first example coming to mind ;⁽¹⁴⁾ but this is also true for education, culture, health and safety, etc... To implement these value choices, transfers of wealth may have to be forced by the political system to protect values not taken into account by the market system. And as a consequence

to such political choices, it may be necessary to discriminate against products produced in polities having made different value choices. The people in a country, say Canada or France, who do not want to see only Dallas or Dynasty or cute American cops on their TV screens may choose to discriminate against cheap foreign TV series, local series being unable to compete on the market due to their necessarily higher costs since they are sold on smaller markets. The people in a state, say Denmark, may value their environment so much as to prohibit sales of beverages in unauthorized, unstandardized cans or bottles, which may make life difficult for importers of beer in Denmark. In all these cases where the effective implementation of a value choice requires discrimination, however, one can see little objection to the use of the public system to make such discriminations, if such use is made pursuant to the will of the people. Value choices imply a cost, a transfer of wealth, usually from consumers to the value protected (a clean environment, intelligent TV series, ...). This transfer of wealth, however, is acceptable in a market liberal society only if it is the result of an effective choice and does not undermine the foundations of market society. And that's precisely where protectionism is a danger for a market democratic society : it amounts to a transfer of wealth, from consumers to producers while protecting producers may not be a value in such a society (if helping failing producers may be), and generally without the consent of those paying because it is consumers, and not taxpayers, who pay for the protection afforded.

(4) A description of issues to be solved always makes the picture of reality look bleak and grim. One should not forget, however, that these problems are the result of a success story : the one of the liberal market society.⁽¹⁵⁾ A comparison between the results achieved by nations organized as market societies and nations organized along any other principle (planification, notably) shows a striking imbalance of results on all accounts, even with regards to the creation of such market "externalities" such as pollution,⁽¹⁶⁾ in favor of market society.⁽¹⁷⁾

At the international level, that liberal trade is a good thing is beyond doubt. As recently reminded by The Economist's,

"It can hardly be a coincidence that the expansion of global trade since 1945 went hand in hand with unprecedented economic growth. Or that the nearly closed economies of Eastern Europe and the Soviet Union failed on every measure. Or that the most protected economies in the third world (India and Argentina, for instance) squandered their potential, while neighbours (such as Thailand and Chile) embraced trade and thrived. Or that, in otherwise fairly open economies, the most protected industries are the most backward (steel in America, farming in Japan, computing in Europe)."⁽¹⁸⁾

It is because of the market system that the Western world has experienced the rates of growth it has known over the last decades ;⁽¹⁹⁾ it is because of the market system that more goods are produced, that more services are offered, but also that we are more politically united. This is important to remember, because it is important to save the liberal market system when advocating reforms : only the market can create enough wealth to develop the world.

However, it must also be remembered that the successes of the market system have their shortcomings which require political action.

(i) Internally, many countries face problems with regards to the allocation of the results of economic expansion and in many situations, there seems to be developing a dual society. A side product of international competition is massive unemployment, homelessness and a formidable need for training and education in all societies.⁽²⁰⁾

(ii) Externally, global warming, deforestation, acid rains, ... remind us that the market can have dramatic destructive capacities when it is untamed by an efficient political system able to internalize negative externalities.⁽²¹⁾ To summarize, the international market economy is a great machine, but it lacks political guidance. This reminds us that the market is inseparable from an effective political system, which we can verify at the international level where we have a market without a political system to adopt policies, with the negative consequences we witness.

(5) Teleologically, the aim to achieve is to develop international economic institutions composing a system allowing for an efficient functioning of liberal society. We need to have a system of public institutions able to adopt the required policies and norms when necessary, but only in such cases, to limit the bureaucratic overload on society. In this perspective, the issue then is to determine what public

institutions should do in a global liberal society where economic power is primarily exercised by micro-economic actors (firms), regulated by the public political system, and then how to determine the allocation of power in a system where power is shared (i) horizontally among institutions (the various states) having geographically distinct jurisdictions and, (ii) vertically among institutions (firms, states and international organizations) having functionally different jurisdictions.

It is necessary to find how such system could be structured. But it is also necessary to find simultaneously the type of forces which can be used to create and maintain such system. One must be aware that the emergence of an international society, in which there are powerful actors other than states, changes the political forces which can be used to create and maintain a new political regime.

(6) The most difficult is to find how to study the world-economy as a system.⁽²²⁾ The economy is usually, "naturally", considered and studied in a national perspective, as if the existence of something like the "French economy" or the "American economy", etc... was obvious.⁽²³⁾ As a consequence, the "international economy" is logically studied as the economic intercourse occurring among nations.⁽²⁴⁾ Free traders then usually advocate free trade using a rather simplistic comparative advantage theory according to which states should not "interfere" with the market, and should let it decide which country has the best relative comparative advantage to produce what goods.

The "internationalization" of the economy shows that there is nothing natural in the economy being considered as something "national", and in particular, comparative advantage is now a complex product of natural conditions, of state and firm policies.⁽²⁵⁾ The classical apparatus to think the world-economy has become outdated.⁽²⁶⁾ Thus, it is widely recognized that the most dramatic change for the functioning of the international economy which has occurred is the globalization of production,⁽²⁷⁾ a phenomenon with which classical free trade theory can barely cope.⁽²⁸⁾ By globalization of production is meant the coordination by multinational enterprises of producing activities taking place within plants established in different countries.⁽²⁹⁾ In recent years, the development and increased specialization of branch plants has led to a spectacular rise of intra-firm and corporate-administered trade.⁽³⁰⁾ Responding to differences in cost and profitability worldwide, multinational enterprises break down into many separate steps production processes that often begin with the extraction of raw materials and end up with the distribution and service of final products, each step in the complex operation being moved to the location most advantageous to the firm.⁽³¹⁾ Given this dramatic change, a new paradigm is needed to analyse the world-economy which, in our opinion, should put the emphasis on the analysis of exchange rather than of production. There is no contradiction here with our point that global production is the most dramatic change which has occurred over the last decades in the

world-economy. We only think that to usefully study the world-economy as a production system, production must be considered in its mirror image, i.e. as a set of transactions taking place in order to make production possible.

Additionally, classical free trade theory does not say much on what forces to use to improve the existing system, while private economic actors are obvious participants in the organization of the world economy.⁽³²⁾

We will therefore attempt to develop an adapted institutional approach, contemplating the world-economy as a system of transactions, in which there is division of labor among firms (and in particular multinationals), states and international institutions for the coordination of economic activity at the global level.⁽³³⁾ It is an enrichment of the traditional economic analysis of regulation which usually considers, on the one hand, the market and its limits and, on the other hand, the role of public institutions in filling in the gaps. It does not limit itself to a superficial understanding of the functioning of the market as an automatic mechanism through which supplies and demands are adjusted using prices determined by consensual transactions, and which imperfections and failures are corrected through public interventions. By considering the economy as a system of transactions, occurring on markets or within firms, it takes into account the institutional role, actual or potential, of firms.

1. The Global Economy Approached in an Institutional Perspective

In an institutional perspective, the relevant part of the activity of economic actors is not that they produce, but that they transact : to produce, economic actors need to purchase raw materials, lease premises and equipments, hire employees, sub-contract what can be done more efficiently in other firms, consult lawyers and accountants, advertise, franchise distributors, etc...

With this perspective, the internationalization of the activities of economic actors raises institutional issues in the following manner :

(1) Transactions among economic actors always take place in a geographical space, using networks of communication to communicate the needs and means of actors, and networks of transportation to move and exchange.⁽³⁴⁾

(i) The extent of the geographical space over which any given economic actor may develop his transactional activity is directly dependent of the state of the technology of communication and transportation.⁽³⁵⁾ Thus, the revolutions in transportation technology, with canals, railroads and then cars, airplanes etc..., as well as in communication technology, with the telegraph, telephone, etc..., have been instrumental for the creation of national markets and companies integrating mass production and distribution.⁽³⁶⁾ Today, it is obvious

that without phones, jets, satellite telecommunications, fax machines, etc... there would be no companies with economic activities all over the globe. The fact that the geographical extension of the extent of companies and markets was made possible by technological change explains why institutional issues arose in such a manner that it is often considered that technology commands institutional change. However, in our institutional perspective, the relationship there is between technological change and institutional change is indirect, and is mediated by the change in the transactional activity of economic actors as allowed by technological change.

(ii) In addition to progress in communication and transportation technology, progress in organizational technology has been key to the extension of the economy over states' borders.⁽³⁷⁾ Progress in organizational technology has allowed, in particular, the development of large companies, organized along multidivisional-forms, and able to coordinate extended processes of production.⁽³⁸⁾ Among these companies, multinationals have developed, coordinating through a single managerial hierarchy whole strips of international economic exchange. Hence, more and more of the companies we are working for have their head offices abroad, and more and more of the companies having their head office in our own country have a great number of foreign employees abroad, in branches or subsidiaries.⁽³⁹⁾

(2) The usefulness of studying the institutional consequences of the globalization of the economy in a transactional perspective is that it puts the emphasis on the absolute need for rules. Rules are needed mostly for two broad sets of reasons, and fulfill either what can be called a "facilitative" function or an "interventionist" function.

(i) From a micro-economic institutional point of view, economic actors need institutions and rules to transact their property rights : they need to be able to rely on enforceable contracts ; they need to be able to rely on weights and other measures.⁽⁴⁰⁾ In a word, they need to be able to rely on some system of rules which will canalize competition and limit the means available to competitors to get a competitive advantage.⁽⁴¹⁾ They need somebody to provide "rules of the game" ; something reliable they can predict, allowing them to plan.

Communities, be they professional (trade associations, guilds, ...) or territorial, can provide the necessary rules, and effectively played such a role at various moments in history.⁽⁴²⁾ However, with the extension of the economy since the XIth century, a particular form of territorial organization has developed which has progressively replaced local rules, measures and languages with national ones : the state.⁽⁴³⁾ The development of the nation-state has largely corresponded to the concomitant development of national tongues, norms, laws, measures, currencies, etc ..., facilitating the economic activities of economic actors within states' territories,⁽⁴⁴⁾ but also implying a closure of the economies.

(ii) From a macro-economic institutional point of view, consensual economic transactions may not be sufficient to institutionalize all economic wishes of the people.⁽⁴⁵⁾ On the one hand, the market is unable to provide some types of goods, such as roads or early-age education, for example. In such instances of market "failures", the public system of institutions must provide artificial public goods. On the other hand, the market may sometimes create negative side effects which are not taken into account by the market itself. A typical example of such market negative "externalities" is pollution, which requires that norms be imposed by the public institutional system to make it more costly to pollute than would otherwise be the case if costs were allocated using the sole market system. Finally, market mechanisms may not lead to an allocation of wealth considered as being "just" in a given polity, which requires rules on economic redistribution.

As a consequence to these limits to the market, and simultaneously with the extension of the space of economic exchange above national territories, the state has developed as the political institution progressively taking over the task to provide the norms required by the development of the economy to fulfill wishes of the people which could not be fulfilled by the market. The role of the state has been fundamental in uniformizing and stabilizing the rules on its territory. In addition, it has progressively assumed itself an economic role, not only providing facilitative rules for transactions to occur, but also influencing transactions by prohibiting some of them, by increasing the cost of, or subsidizing, others.

(3) In our transactional perspective, the way of looking at the changes brought by the globalization of the economy is to consider the geographical changes which occurred in the extent of the networks of economic transactions.

Economic exchange - transactions - always take place using networks : the roads, railways or canals used to reach suppliers or customers, to go to markets or fairs, the phone to buy at a distance, the computer networks to transfer currencies, etc...

States have built their national economies⁽⁴⁶⁾ in particular by building, or subsidizing, their national networks of communication and transportation.⁽⁴⁷⁾ Using these national networks, firms have developed their own networks of exchange and communication, with their suppliers and distributors, customers and other contractors ; and thus, they have developed national economies.⁽⁴⁸⁾ In a liberal economy, if the state usually builds the networks of communication and transportation, it is private economic actors who, by using the national networks of communication and transportation, have built national economies. A "national economy" is always in fact a network of micro-economic exchange relationships : it consists in the sum of the transactions which occur using the networks of roads, railroads, railways, telephone networks, computer networks, etc... spreading over the territory ; and these transactions are for a great part coordinated by firms.

As long as states were opposing strong barriers, through tariffs or otherwise, to the interfacing of the networks (physical or virtual), the sum of transactions occurring using the national networks could give the illusion of composing units, coherent and quasi self-sustaining "economies", inherently associated with the corresponding strips of land. With the globalization of markets, products and firms, and the interconnection of the transportation and communication networks which translates in a rate of growth of international economic exchange faster than that of Gross National Products, this whole association of "national economies" and national territories becomes outdated ; and this challenges the state-system of regulation of the economy. (49)

2. Economic Integration Defined

(1) One can consider that a state of absolute economic integration (50) exists over a territory when there are no barriers impeding economic exchange among economic actors on such territory. Fundamentally, economic integration means that there is no discrimination among economic actors on the basis of their origin (territorial, racial, social, or other) on the economically integrated territory : they all transact on equal terms on the whole territory. Since we deal, in this book, with international economic integration, the sort of barriers we are most concerned with is the territorial kind. Some territorial barriers may be the result of natural conditions (oceans,

mountains, etc ...) ; but institutions may create barriers of their own and it is with this type of barriers that we will be concerned in this book. It must be realized however that political institutions may play a great role in reducing the effect of natural barriers against exchange by building or subsidizing roads, canals, tunnels, bridges, phone companies, airplane manufacturers, etc... A meaningful international economic integration may thus require a positive action in the form of a reduction of physical barriers to economic exchange, in the same manner as this is done today, for example, by the institutions of the European Community to facilitate the integration of the European economy.

We will start our analysis by accepting in first approximation that in an economically integrated polity, there are no internal customs, forced trades, or anything equivalent, and that the norms applying on the territory being the same for all, no barriers exist due to differences in regulation. That means that goods and services are traded with their price determined by a pure market mechanism, within the set of constraints created by the political system. No customs means that no goods are loaded with a tariff which would advantage the goods (domestic) traded free of tariff. No forced trade means that consumers are free to buy from any producer they fashion, who are themselves equally free to sell to consumers whose trade they want. The fact that norms are the same for all means, for example, that no producer is subject to an anti-pollution statute having for effect to increase his costs,

while others are not, or that rules concerning the number of hours worked per week are the same everywhere, or that the amount of minimum wages to be paid is the same everywhere, etc... The fact that market forces are left undisturbed means, in short, that no one is forced to buy at a price higher than that otherwise available, and that no one is forced to sell at a price lower than market forces would normally command. Consequently, no producer nor consumer is subsidized by political action.

One must realize that in highly integrated economies, there are usually actually some forms of economic discriminations among the various parts of their territory : economic activity on some part of the territory is subsidized, while it is disadvantaged on some others, through taxation or otherwise. For example, it is usual for states to have policies providing economic incentives, fiscal or otherwise, to investments in the lesser developed parts of their territory ; or some taxes may be higher in some parts of such territory to discourage some sort of activity there, etc... such measures work very much like a tariff increasing the producers costs out of the polity imposing it, and thus increasing the prices domestic producers can command for like products, at the expense of local consumers. However, such forms of subdidization are usually decided for redistribution purposes by political institutions having jurisdiction over the whole territory considered.

Such forms of redistribution may be desirable at the international level, particularly if one considers the task of providing a sound regime for a proper economic development of the third world. But such type of political action, if common at the national level, requires a higher degree of political union than the one existing at the international level today. Our immediate aim is thus only to set the foundations of a sound trading system, even though we hope and think that such system may eventually lead to higher forms of economic integration, and political union, accompanied by international redistribution policies (under the form of development subsidies, for example).

(2) As a first approximation, the state of international "economic integration" among different states can then be understood as a relative absence of artificially and voluntarily created economic barriers between two or more countries.⁽⁵¹⁾ In an international context, the effect of the economic barriers is felt at the political border, which then becomes an economic frontier. An economic frontier in turn can be defined as any demarcation over which mobilities of goods, services and factors of production are relatively low.⁽⁵²⁾ On both sides of the "frontier", the determination of prices and the quality of goods, services and factors of production is only marginally influenced by the flows over the "frontier".⁽⁵³⁾

Because of our concentration on barriers to international exchange erected by states, the political border is of particular significance as an economic frontier. However, the reader should be aware that economic frontiers do not necessarily coincide with political borders, though they commonly do. For one thing, one must notice that states are not the only institutions imposing barriers to international economic exchange. Regions, departments, local communities, professional organizations, unions, etc... may also impede international trade in a severe manner which may require that restrictions to do so be imposed on them. We will not address this issue - which usually is a domestic constitutional law issue - here, notwithstanding the fact that it should be addressed for the establishment of a sound international economic regime. This is particularly true when the states integrated in a new regime are themselves federal states.⁽⁵⁴⁾

In addition, the fact that there is a political border doesn't imply as such that there is an economic frontier. An economic frontier may naturally coincide with the political border when the political border between two countries has been partly determined through history by the presence of some geographical barrier hostile to economic intercourse between the two countries : a chain of high mountains, a lake, a desert, a swamp, ... Here, in a sense, it may be that the political border is a consequence of the economic frontier inhibiting the intercourse between two separate communities. It is also true that, generally speaking, even though economic frontiers can be very distinct from political borders, they commonly coincide. However,

(i) there can also be artificial economic frontiers within the borders of a state : for example, long after France had become politically unified with a strong central state, trade within its borders remained impeded by internal tariff barriers.⁽⁵⁵⁾ France became a free trade area only in 1792.⁽⁵⁶⁾

(ii) On the other hand, in "multi-state integrated economies", i.e. federal or federal-like systems - such as the United States or, increasingly, the European Community -⁽⁵⁷⁾ internal political borders can be of little significance as economic frontiers.

All these refinements aside, it remains true that in most instances, the political border is often an economic frontier just because it is a political border, implying the application of different rules having restrictive economic effects.

One can consider as a given that when there exists a geographical space divided into territories over which various institutions have sovereign jurisdiction, the existence of those several institutions is likely to create man-made barriers to economic exchange on such space. This is certainly the case in times of war or during other political conflicts accompanied by embargos or like-measures. However, even in times of peace among friendly nations there may be unnecessary barriers, deriving from the use by states of their sovereign right to create rules, institutions and norms independently one from another. Adopting norms or creating institutions having

for purpose or effect to create economic barriers between two communities is like erecting a chain of mountains to isolate them, or increasing the distance separating them. If, for one reason or another, it is desired to facilitate intercourse between two communities, some sort of means must be found to reduce barriers. One of the purposes of international economic institutions is to reduce these barriers to international economic intercourse.

3. The International Economic Order

(1) There is an obvious conflict or dilemma between the claim of domestic political autonomy, of "sovereignty", and the need for international rules to allow for international economic stability ; the purpose of the existing institutions of the world economic order is to attempt to solve this dilemma.⁽⁵⁸⁾

The need for rules at the international level comes from the absolute need for rules for markets to function. Just as a stable institutional environment is required for the effective functioning of the market at the national level,⁽⁵⁹⁾ so such an environment is necessary at the international level.⁽⁶⁰⁾ International transactions, being affected by the policies of numerous governments, are exposed to a higher degree of uncertainty than domestic ones.⁽⁶¹⁾ It is therefore necessary, for the market forces to work at the international level in an orderly fashion, that an accepted system of rules, governing those policies in national economies which have effects in other national economies, be developed.⁽⁶²⁾

(2) The international economic order can be perceived as consisting of two sets of rules : one relates to the "real" side - that is trade, investment, factor movements, ... of the world-economy ; the other relates to the monetary side of the world-economy.⁽⁶³⁾ The recognized purpose of the corpus of monetary and trade rules is to allow the effective functioning of an integrated world market.⁽⁶⁴⁾ Price changes can then convey to all participants information about investment opportunities, allowing firms to plan for expansion or adjustment.⁽⁶⁵⁾

The monetary rules ought to ensure the stability of exchange rates if an integrated world-economy is to be created. But, short of that, rules can ensure at least the convertibility of national currencies, which is necessary to allow the coordination of multilateral trade through the market.⁽⁶⁶⁾

On the "real" side, trade rules in GATT are the only multilateral rules at the global - if not universal - level. Based on the principle of reciprocity,⁽⁶⁷⁾ the Most-Favored-Nation (MFN) principle,⁽⁶⁸⁾ and the National Treatment principle,⁽⁶⁹⁾ they have both the function to ensure equality, i.e. nondiscrimination, among competitors, and some minimal stability in trading conditions.⁽⁷⁰⁾ Rules concerning freedom of investment and of factor movements are increasingly important for micro-economic actors ;⁽⁷¹⁾ but so far, they do not fall under the jurisdiction of GATT, and are

dealt with bilaterally, generally in Friendship-Commerce-Navigation (FCN) treaties. The content of such treaties varies, but their main rules are also based on reciprocity, MFN and non-discrimination principles. They usually provide for (a) rights of entry for business and residence ; (b) protection of individuals and companies ; (c) rights and privileges of individuals and companies with respect to : (1) practice of profession ; (2) acquisition of property ; (3) patents ; (4) taxes ; (5) remittance of earnings and capital ; (6) competition of state-owned enterprises ; (7) expropriation or nationalization ; (8) access to courts ...⁽⁷²⁾

The facilitative function of rules⁽⁷³⁾ is relatively well fulfilled at the international level by the existence of a network of international bilateral or multilateral treaties.⁽⁷⁴⁾ It is at the level of the institutions, such as GATT, whose jurisdiction imply that they have to deal with the fulfillment of interventionist state functions which imply interferences with the functioning of the market mechanisms that difficulties are mostly felt. It is for the development of such institutions that we will try to develop a new type of analysis.

We first have to make clear what our purposes - and the purpose of economic integration generally speaking - is.

4. The Purpose of Economic Integration

(1) Many different types of arguments are made from various corners to advocate international economic integration. Two types of arguments are made by economists and business people, which are mostly directed against protectionism, and favor economic integration because it increases welfare. Other arguments are made by various internationalists, ecologists, etc... in favor of economic integration because it favors increased political cooperation among states. Finally, it is often claimed that economic integration is positive because it prevents war.

(i) For economists, the fundamental significance of economic integration is that differences in the prices and availability of equivalent goods, services and factors of production are decreased to the irreducible minima arising from spatial differentiation.⁽⁷⁵⁾ It is generally held that this improves the "welfare" in the integrated economies : there are winners and losers, but the economy as a whole is better off.⁽⁷⁶⁾ In other words, economists argue that protectionism should be rejected because it is "inefficient".⁽⁷⁷⁾

(ii) The other argument against protectionism is made by some business people who argue that, in a world where the costs of research and development are large, they must have access to a global market in order to justify their

efforts.⁽⁷⁸⁾ Some also invoke the need for large markets to fully benefit from economies of scale. Without access to large markets, they argue that they cannot make as much research, investments, etc... as they could otherwise, and that they do not hire as many people as they could if markets were opened.

(iii) In addition to these two arguments in favor of integration (because they reject protectionism) there is an argument in favor of integration which is more directed at the benefits derived from political cooperation among states. Thus, it is often said that, in many different fields, international agreement on economic policy is useful, and often necessary, because independent national actions to promote trade or stability or other economic policies will usually be frustrated by the actions of other states.⁽⁷⁹⁾ For example, it is often said that states should agree on rules preventing export subsidies because if let free, states will enter a competitive game in which they will reciprocally subsidize sectors of their economy in a costly and ineffective manner leading to wide inefficiencies in the world economy. Or it is often claimed that states should agree on common norms to protect workers from international competition, to prevent pollution, etc ... These are only examples, and there are many other instances where it is held that international cooperation is necessary to bring order in the international economy.⁽⁸⁰⁾

(iv) Lastly, there is an argument in favor of economic integration, mostly made by political scientists, and which addresses the issue at another level than the previous arguments we have mentioned. It does not refer to benefits derived from economic integration in terms of increased welfare, be it for the economy as a whole or for dynamic exporting companies. Neither does it refer to the benefits from economic integration in terms of efficiency of the political system of economic regulation. Some simply claim that economic integration reduces international tensions, and the risk that retaliation against actions felt as being offensive may lead to more retaliation, and eventually to war.⁽⁸¹⁾ In particular, the connection between free trade and peace was relentlessly made by someone like John Maynard Keynes.⁽⁸²⁾

(2) Some sort of connection is sometimes made by authors between these various arguments in favor of economic integration. However, there is no articulate theory explaining the relationship there is between these arguments. That there is a relationship and that the arguments are not mutually contradictory is in fact not obvious. For example, economists say that a protectionist state hurts its consumers and its economy taken as a whole, which as a whole is made less efficient by protectionism than it would otherwise be. But it is then a wonder to find why a pro-trade state could go to war against a protectionist state if the latest is only hurting

itself ? If free trade is so good for the economy as a whole, and in particular for consumers who buy cheaper products and services, how is it possible (i) that protectionism is so widespread, and (ii) for what reason would a state be ready to go to war to change a policy which we are said only hurts the protectionist state's economy ?

One simple explanation is that neither the end nor the actual functioning of public institutions making trade policy is to maximise consumption as usually assumed by economists. If the interests of consumers are somewhat taken into account in trade policy - which is one of the reasons why we have a relatively open system -⁽⁸³⁾ trade policy makers also take into account other interests in making their decisions. Of particular importance are (i) the interests of domestic producers⁽⁸⁴⁾ and (ii) the interest policy-makers perceive there is in protecting the set of regulatory and other interventionist economic policies of their state, which we can loosely term the "national economic redistribution system".

(i) The interest of domestic producers is neither in free trade nor protectionism per se. Depending on their position in the business cycle, domestic producers' interests may either be to have their potential markets expanded by free trade policies or to obtain protection from foreign competition by the erection of protectionist barriers. The interest of national producers thus depends on the competitive conditions in their industry, which vary from industry to industry, except when recessions affect all

sectors of the economy. If a state wants to take into account the interests of its domestic producers, it must thus have differentiated trade policies, according to the position of such producers in international economic competition.

(ii) In addition to protecting the interests of the domestic economy as a whole, of domestic consumers and of domestic producers, states trade policy makers have in mind another set of concerns. Since the invention of the welfare state, the state can be perceived in part as being a huge redistribution machinery influencing the allocation of economic resources through regulatory, fiscal or other types of measures. Of concern for states is that their redistribution policies may be disturbed by foreign competition. For example, if they prohibit some type of production process because it has for side effect acid rains destroying forests, they may be afraid that if their neighbours don't do the same and that if borders are kept open to the products produced using the polluting production process (usually cheaper than the clean one), the end result will be the depletion of the local industry for the type of products concerned and the depletion of forests, since rains tend to be ignorant about political borders. Or states may be concerned that if competition in labor intensive products from countries with labor costs at a fraction of theirs is set free, this may lead to high unemployment and deplete their unemployment support

programs. There are obviously many other types of economic policies which states fear would be dramatically challenged by free trade, and here again, these are only examples.

The interaction of all those partial interests in and out of the institutions in charge with trade policy-making leads to actual trade policies. At any given point in time, some interests dominate others. For example, in times of economic crisis, lousy producers' interests may dominate since keeping a free trade policy, and thus letting international competition play its role, may lead to massive unemployment which may create difficult political problems. The short term interest of trade policy-makers (to limit unemployment) is congruent with that of troubled firms (to limit foreign competition).⁽⁸⁵⁾ It is true that limiting competition limits the adaptation of domestic producers to competition conditions, and is not in the long term interests of society. But only institutions and norms can provide the potential means to counterbalance the short term interests of both sectional interests and politicians with the long term interest of society. Inadequate institutions and norms explain why this counterbalancing does not properly occur today, and why protectionism is so widespread.

(3) We think our transaction approach has the advantage to explain the wonders of trade policy and what can be done about it because neither consumption nor production is at its roots and comes first in the analysis. It claims neither that the

interests of consumers nor that those of producers should come first in policy decision-making. Because the general interest is the end of political institutions, in the context of a market society which considers that in principle, the market is the best server of the general interest because of the socializing consequences transactions have, it is transactions per se which should be set free as much as possible. This leads us to a second consideration which is that our approach is neither of a micro-type (taking into account the interest of each consumer who must pay more if protectionist policies are adopted, or taking into account the interests of a particular firm, depending on its position in the business cycle, ...) nor of a macro-type (taking into account the interest of the economy as a whole, of peace, ...). It is both micro and macro because each transaction has both micro and macro-consequences. Someone who likes red-sporty italian cars see his welfare increased by purchasing a Ferrari. Simultaneously, he or she buys a part of Italian culture and traditions, and improves the Italian economy, contributing in reducing unemployment, contributing through the taxes paid to the Italian budget, etc... Buying a foreign good amounts to buying the culture, norms, institutions, etc ... embedded into such good, and thus this micro-action has macro-consequences.

What is at the root of our analysis is thus the exchange relationship, and what we will consider in this book is the set of social consequences this relationship has which are relevant for an analysis of the institutional system within which trade policy should be decided.

One of the advantages of our type of transaction approach is to give a single explanation to the different arguments in favor of economic integration and to be able to show how micro-barriers (at the transactional level) can lead to macro-effects (at the political level) and how these macro-effects are explainable due to unwarranted political interferences in micro-transactions.

(4) Here again, one has to start with the basic market transaction. There is something magical with market exchange : when two individuals mutually and voluntarily give up something in exchange for something given up by the other, both individuals are better off.⁽⁸⁶⁾ No one loses, both parties win. For this reason, exchange is fundamentally just, equal and fair in an automatic way : by agreeing to exchange, each party improves the welfare of the other by improving its own. There is normally (but there are exceptions) no need for any external political interference to intervene in this exchange relationship to tip the scales to ensure justice. On the contrary, interfering with market exchange in the absence of a proper justification is unjust.⁽⁸⁷⁾

One can then present protectionism in market society as being fundamentally unjust. And since part of the process of economic integration consists in preventing protectionism, at least part of the purpose of economic integration is to ensure justice.

We will see this with a trivial example. Let's assume that a state adopts a measure which is unquestionably protectionist. With our transaction-institutional approach, protectionism is unjust (a) for would-be parties to transactions prevented due to the protectionist measure, and (b) for "the economy as a whole" (and thus the actors within it), which suffers due to the inefficiency created. In terms of injustice, there are thus both domestic and foreign effects to a protectionist policy :

(i) Starting with the domestic effects of protectionism, it takes away wealth from consumers to give it to protected sectional interests at the expense of consumers and of the general efficiency of the economy.⁽⁸⁸⁾ This is a sort of redistribution of income policy, and it is unjust under normal circumstances. Why is this type of redistribution policy unjust, when there are so many other forms of redistribution in modern society which are not complained about ? According to what criterium should this form of redistribution be nailed ? Protectionism is unjust because it is more often the case than not that one cannot find any laudable reason to take away money from consumers, who are committing no crime when purchasing goods, to give it to lousy producers, who would not get the consumers' trade but for the redistribution policy. The whole purpose of having a market society is that it gives an incentive to people to be better than their competitors. If the market mechanism is tainted by redistribution policies which serve no other policy than that of subsidizing producers for the mere sake

that they are national producers, then it can be said that, in the context of an international market society, protectionism is unjust.

At the domestic level, when unjust redistribution policies are imposed within one polity, there is internal political resistance when the sectional interests hurtled are able (i.e. if the institutional system allows it) and willing to organize themselves to resist. This does not always happen. But with protectionism, this very rarely happens at all since those who suffer are (a) the economy as a whole, without the possibility to easily weight how much,⁽⁸⁹⁾ which makes it difficult to organize resistance, and (b) consumers, who are notoriously unable to organize themselves to act politically.⁽⁹⁰⁾

(ii) But protectionism is also a source of injustice for constituents of other polities than the protectionist one, since international transactions which would otherwise occur do not occur because of the protectionist measure. Would be exporters to the protectionist state are then deprived of outlets for their products. This is neither just nor unjust in the absolute as long as foreigners have no right to sell their products in the protectionist country. However, if it is seriously believed that the market is a good socializer at the international level as well as at the national one, and that thus barriers to the interfacing of national markets into a world market should be eliminated, then protectionism is unjust for would-be

foreign exporters, for the same reason that it is unjust for domestic consumers : lousy producers are protected from loosing market share to the benefit of presumably more efficient foreign producers, whom domestic consumers would prefer to trade with.

This explains how retaliatory protectionism, even though it is economically absurd, may occur due to the sentiment of injustice felt outside the state imposing it. The traditional economic analysis of protectionism rightly shows that states imposing protectionist measures are hurting their own economy voluntarily, that this is inefficient, and that thus retaliation is absurd. It cannot explain how protectionism and retaliation are widespread phenomenon in a world where people are prone to think and act rationally. Our analysis can explain this and how, in the presence of imperfect institutions, rationality and protectionism can co-exist, and why it is imperfect institutions which should be blamed for it. Where protectionist measures are imposed in a polity, potential exporters in the protected country are hurt outside of the state imposing protection, and this is where they will usually react, their only device being to use the political institutions of their own state to try to hurt the wrongdoer. This often leads to retaliation, and more protectionism, which is certainly absurd but happens because our actual institutions imperfectly represent the various interests of society.

There is then a paradox : retaliation is absurd, but it occurs because states apparatuses are circumvented for sectional interests : in the protectionist state, those of the protected sector ; in the retaliating state, those of the sector which exports are prevented due to the protectionist measure.

In our perspective of preventing protectionism for justice purposes, and explaining the prevalence of protectionism due to imperfect institutions, the most difficult problem to deal with is posed by these measures which appear to some (usually suffering from them out of the state imposing it) as being protectionist and which appear to others (usually, sectional interests in the state imposing the measures and benefitting from them) as being taken for perfectly laudable political reasons.

The difficulty is that in modern society, justice is a little bit more complex than I have said so far. If markets were perfect, ensuring justice through trade would be relatively easy : opening borders would do the job. However, we know that markets are not perfect,⁽⁹¹⁾ and this is where difficulties really begin.

(5) Fundamentally, as we have already seen, there are three sorts of imperfections in markets :

(i) Some sort of goods ("public goods") are not, or are inadequately, supplied by the market, and must be provided by public institutions, which have the capacity to tax on a given territory to finance the creation or maintenance of such goods. At the international level, the provision and maintenance of such goods often requires cooperation among states. The mere fact that there is progressive internationalization of society makes that we need more international cooperation in this respect. However, this first type of market imperfection is not an issue for our immediate concern. Providing public goods may be perceived as subsidizing one's economy : better schools, roads, airports, etc... improve its functioning. But, except in unusual circumstances, this type of subsidization should not be prohibited by international economic law.

(ii) When economic exchange has effects on more interests than on those purely private interests taken into account by the economic actors directly involved in the transaction, and when such effects are negative (the economists' so-called "negative externalities") there is need for political intervention, usually under the form of regulation. The system of economic regulation, at the decentralized and centralized levels (of which there may be several : regions, states, international organizations), should ensure that such interests are taken into account. Most of the developments of this book address this issue, since it is often extremely difficult to distinguish

warranted regulation and protectionist legislation. A normative analysis must be made, allowing to find according to what rationale some sort of regulations should be condemned as protectionist while others should be accepted. An institutional analysis must complement this normative analysis to show what institutions should be developed to ensure justice in regulation. This books aims at addressing this issue under both normative and institutional aspects. But it is necessary to first examine another source of market imperfection raising a justice problem in both domestic and international society, which we can put out of our way relatively quickly.

(iii) Even assuming a functioning of the market under regulatory circumstances ensuring the internalization of all market negative externalities, this may not lead to an allocation of wealth politically considered as "just".⁽⁹²⁾ For example, a polity may estimate that it is not just that those who are unable to command wages above a certain minimum should be left to work for wages below such minimum, and thus may impose regulations on minimum wages. Or a polity may estimate that children below a certain age should not be employed, etc... Within one polity, such type of rules limit competition, and thus limit the freedom to transact. Some means to get a competitive edge are simply prohibited because we find collectively, today, that they should not be allowed. Some say that such rules are economically inefficient. This may be true or not, and it

is not our purpose to discuss this issue here. In our perspective, as long as these measures are constitutionally decided, even if they impose a cost on the economy due to the inefficiencies created, they must be accepted as being just. If, for example, a majority in the polity does not agree that those who are not able to obtain more than a certain amount of wage through free transactions should be subsidized, then the law should be changed : the political system is made for this. But this type of political decisions should not be prohibited as such by the institutions of the international economic integration.

However, what some argue is that such policies cannot be sustained if free trade with countries with lower standards is allowed. This may be true if the country adopting the policy has completely lost its comparative advantage in the world economy. But adopting protectionist policies to protect welfare redistribution policies is still something of an absurdity. Wealth can be redistributed only if it is created, and in an internationalized economy, that is, in an economy where the division of labor extends above states borders, imposing protectionism certainly reduces wealth, and eventually eliminates the possibility to redistribute something which does not exist anymore. One can think about the economic fate of Albania, for example, to imagine what redistributing wealth may mean in a closed economy. In some developed economies, it often happens that business men require protection or the lowering of minimum wages to be

able to compete with their foreign competitors. Lowering minimum wages is politically difficult, and politicians may be induced to prefer providing protection. This is absurd : in those industries where even the payment of minimum wages only prevents producers to effectively compete with their foreign counterparts, this simply means that the industry has lost its comparative advantage. That may be too bad for local producers (but they have the possibility to delocalize, or at least, this is a right they should have and which should be internationally traded against free trade)⁽⁹³⁾ ; but it is quite a positive sign for the polity losing its comparative advantage. How is it possible to complain when a rich country loses its comparative advantage in labor intensive industries in favor of pauper labor countries ? It is not an ordeal to be rich, and it is certainly not because producers may have to change activity as a consequence that borders should be closed to make the country poor again !

(6) As should already be clear from many of our examples and expressed concerns, advocating international economic integration is certainly not akin to advocating the "death of the state", the disappearance of the state as a meaningful policy maker. However, it may in some way conflict with the concept of sovereignty as traditionally perceived. It is true that to build new institutions to integrate the global economy on the basis of market principles, we fundamentally need to share some basic rules :

(i) First, and it is easier to agree on this today than just a few years ago, the market should be perceived as being the prime socializer. Other forms of international economic integrations than those driven by market forces may be possible, for example by coordinating planifications, as was the case in the now defunct COMECON. But, irrespective of obvious efficiency considerations, such a form of international economic integration simply could not be plugged into today's international economic system, which at its roots is mostly and increasingly composed of market economies.

(ii) Second, there should be a common set of fundamental rules prohibiting some forms of competition, such as the prohibition of slavery, of child labor, etc... There is a bare minimum, to be defined in common, below which we cannot agree to let the free play of competition work. However, since people around the world do not share the same values, and have differences of appreciation with regards to the meaning of common values, it must also be acknowledged that there may be instances where removing economic barriers may collide with cultural, religious and other values.⁽⁹⁴⁾ In such instances, the constitutional documents establishing a multi-state economic integration must provide that the preservation of such values may warrant economic barriers. This is the case today in particular in GATT,⁽⁹⁵⁾ and in the European Economic Community,⁽⁹⁶⁾ whose treaties contain strikingly similar

provisions in this respect. This point is fundamental and should be stressed so that the reader is not misled by the developments in this book : economic integration can only go as far as a community of culture and values allows it to go. (97)

5. Objective and Plan of the Book

The objective of this book is to develop a scheme of analysis to determine what types of institutional mechanisms could be developed to prevent the creation of unnecessary barriers to international economic exchange. Its perspective is in the continuity of the European conceptual and historical experience which has shown how original forms of institutions can be progressively developed to integrate economies which were previously divided among competing nation-states to create an area of peace, economic dynamism and political freedom. Its perspective is also comparative in that it will consider the American federal experience as relevant in this sense that it is also the history of a progressive integration of originally divided states with little federal powers into a common single market largely federally regulated.

In addition, both the United States and the European Community systems allow a certain degree of political and legal autonomy of states, and this is their relevance, as systems, to the larger system of integration of Western type economies.

In a first Part, we will consider the institutional needs accompanying international economic integration. We will first show that economic integration is structurally akin to legal integration, prior to look at the GATT-system and its historical origins. We will then show how GATT's function in the world-economy is a constitutional one, which can not adequately be fulfilled by such a primitive institution.

In a second Part, we will study how non-tariff barriers are eliminated in the two largest federal systems in the world : the United States and the European Community. We will see that these barriers are eliminated using two very distinct institutional mechanisms : (i) the creation of central norms, uniformizing competition conditions on the federalized territory, and (ii) the prevention of state protectionism by judicial interventions, prohibiting states' norms having discriminatory intent.

In the third Part, we will try to break a theoretical path towards a world economic constitution. We will develop an extended economic analysis of federalism to present the type of new deal which could be made among states to develop institutional mechanisms able to address in a meaningful manner the various types of non-tariff barriers existing in the world of today. Our analysis of federalism will also show the fundamental role played by micro-economic actors to maintain the institutional equilibrium of federal systems. It will show that a new global system will be developed only if corporate forces benefiting from an increased integration of the world-economy are harnessed to counterweight the protectionist forces resisting institutional change.

PART I

ECONOMIC INTEGRATION AND INSTITUTIONAL NEEDS

We will first show how economic integration can be meaningfully understood only as legal integration (§1.1). We will then quickly present the functioning of the GATT-System, as well as its historical origins (§1.2). Finally, we will show how GATT can be perceived as an embryonic federal state and review how inadequately it fulfills its constitutional function (§1.3).

1.1 ECONOMIC INTEGRATION AS LEGAL INTEGRATION

The problems created by the development of an international economy all stem from the fact that while markets are unifying, sovereignty is divided.⁽⁹⁸⁾ In this section, we will show how economic integration can be understood as legal integration, and how the various issues raised as a consequence of the increased internationalization of the economy are due to an absence of legal institutions or mechanisms suited to internationalized markets and companies.

We will first see that the traditional, mechanical approach to economic integration, mostly developed by economists, is ill-adapted to the complexities of today's global economy (§ 1.1.1).

A more fruitful approach is to attempt to expand the results of the comparative analysis of federalism (§ 1.1.2). This approach allows to teleologically conceptualize the existing system of regulation of the international economy as the embryo of a world federal state, and to confront the paucity of the existing mechanisms with the richness of the approach necessary to respond appropriately to new global issues (§ 1.1.3).

1.1.1. The Inadequacy of the Traditional Taxonomy of Economic Integration

(1) The conventional wisdom on economic integration comes from Balassa's seminal work.⁽⁹⁹⁾ According to the Balassain model of economic integration, there are various forms of economic integrations, representing varying stages of integration. In first approximation, one can distinguish between the following :

(i) In a free trade area, tariffs (and quantitative restrictions) between the participating countries are abolished, but each country retains its own tariffs against non-members ;

(ii) the establishment of a customs union involves in addition the creation of a common external tariff wall against non-member countries ;

(iii) a higher form of economic integration is attained in a common market, where restrictions on factor movements, i.e. raw materials, people, companies and capital, are also abolished ;

(iv) an economic union combines with the elements of a common market a certain degree of harmonization of economic, fiscal, monetary, social and countercyclical policies ;

(v) finally, total economic integration presupposes the unification of economic, fiscal and other policies.⁽¹⁰⁰⁾

(2) The major difficulty with the Balassain model of stages of economic integration is that it contains a serious flaw, ultimately recognized by Balassa himself.⁽¹⁰¹⁾ The definitions given conform to the principles of classical economic doctrines but do not apply to present day market economies, which are characterized by a considerable degree of state intervention.⁽¹⁰²⁾ In a world of non-intervention by the state in markets, the erasure of classical protectionist measures may make national frontiers quasi-irrelevant as economic frontiers. However, the augmented scope of government intervention makes such frontiers economically relevant, even if there were to be complete abolition of traditional protectionism under the form of tariffs or quotas.⁽¹⁰³⁾ States entering into any form of economic integration thereby want to promote to some degree "free" and "fair" competition between the economic actors established on their territories. In the regulatory environment of modern economic life though, eliminating tariffs alone will not be sufficient to fulfill this aim.⁽¹⁰⁴⁾ Competition between economic units originating from different states is not only distorted by tariff barriers, but also by the numberless non-tariff obstacles to trade.⁽¹⁰⁵⁾

(3) The additional degree of complexity added to the analysis of international economic integration due to the economic role of the state is increased by the simultaneous need of centralization and decentralization in the provision of norms regulating market activity.

To take the example of environment protection, if global issues require global norms, not all environmental issues are global and, given the usually poor performance of bureaucracies, it would be absurd to centralize the process of norms creation for all environmental matters. It is typically production pollution prevention which in some cases requires centralization in the process of norms creation. This is necessary to avoid states' competition in providing to producers under their jurisdiction a relative comparative advantage preventing the decentralized adoption of decentralized norms.⁽¹⁰⁶⁾ With regards to consumption pollution, centralization of regulation usually makes no sense :

(i) Production pollution requires centralization in the process of norms creation when it involves an over exploitation of global commons, such as the oceans, the atmosphere or the global climate. For example, the depletion of the ozone layer, which protects the Earth's surface from the harmful effects of the sun's ultraviolet light, urgently requires international cooperation.⁽¹⁰⁷⁾

No state alone can do anything to dramatically improve matters with regards to this issue,⁽¹⁰⁸⁾ and divided states may even be prevented from adopting the necessary norms by international economic competition.⁽¹⁰⁹⁾

(ii) With regards to consumption pollution, the situation is wholly different. Consumption pollution is usually local and creates local harm. It is logical that local polities should be the ones deciding whether there is harm, and what to do about it. For example, some may consider that consumption pollution under the form of littering of cans of beer or soft drinks is obnoxious and should be prohibited ; some may consider that it does not matter or that the harm does not justify having more cops to check what people throw on the streets ; some may think that a clever way of solving the problem is to create an economic incentive for people to keep their cans instead of throwing them away, by giving the cans an artificial economic value, for example by statutorily requiring retailers of the concerned beverages to pay to consumers a statutory defined "refund value" for the cans they return.⁽¹¹⁰⁾ Some may think that a blending of all possible solutions is appropriate ; but in any case, there is really no reason why there should be an international agreement on what to do with empty cans of beer.⁽¹¹¹⁾ Public institutions should answer to the needs of the people which can not be adequately fulfilled by the market, and as a general rule, the closest institutions are to them, the better they can fulfill these needs.⁽¹¹²⁾ It is only when there is some impossibility for the need to be fulfilled at the decentralized level that there should be centralization, which is often the case for production pollution regulation

due to states' competition. But this is not usually so for consumption pollution regulation, because it usually does not entail some form of competition among states to be avoided. The costs deriving from the regulation of consumption pollution are usually paid by consumers, and since consumers are somewhat bound (as consumers) to the territory of their state, states are not prevented from adopting necessary measures by the existence of competing states.

(4) To summarize the institutional issue created by the globalization of the economy, if we heuristically treat the world-economy as one polity composed of several states, such polity can not combine over time a policy of fully open state borders and a complete decentralization of all positive state functions ;⁽¹¹³⁾ simultaneously, a complete centralization of all state functions would be inefficient.

In the traditional wisdom, the dilemma between open borders and positive state may lead to three outcomes :⁽¹¹⁴⁾ (i) An abandonment of positive policy initiatives combined with a confirmation of open borders ; (ii) a continuation of open borders combined with a centralization of positive policy ; or (iii) a continuation of disintegrated (non-central) positive policy combined with a withdrawal from open borders.

The first outcome (the abandonment of the state as a policy-maker) and the third outcome (the abandonment of open borders policy) are clearly unacceptable for us. The second

possible outcome is unacceptable because of the shortcomings associated with a centralization of positive government functions mentioned above. However, a fourth and richer approach, which we will propose in this book, allows us to contemplate what would be an appropriate blending between centralization and decentralization of positive state functions in such a manner that open borders can be combined with the existence of positive states. This approach, I contend, is an enrichment of the existing economic analysis of federalism.

1.1.2. The Economic Analysis of Federalism

(1) In the light of the development of the positive - i.e., interventionist - state, a line of inquiry of economic integration consists in an analysis of the economics of federalism.⁽¹¹⁵⁾ The economic theory of federalism is a branch of the economics of the positive state.⁽¹¹⁶⁾ Its starting point is the classical liberal/individualistic view of society which is that as long as private markets efficiently allocate goods and services through the price system, the various preferences and resource valuation of the different individuals will be institutionalized by means of a network of consensual transactions.⁽¹¹⁷⁾ However, it is then assumed that when such institutionalization does not spontaneously occur, the sovereign will intervene in private markets to provide public goods, force the internalization of social costs, redistribute wealth and employ macro-economic instruments to control economic growth, price stability, employment needs and balance of payments.⁽¹¹⁸⁾

The "law and economics" approach used in the economic analysis of federalism, developed by Heller, may be best understood as a type of structural explanation which attempts to offer a synthetical account of political, economic and legal institutions.⁽¹¹⁹⁾ This assimilation occurs through a theoretical reduction of each set of institutions to a concurrent aspect of a single cultural form.⁽¹²⁰⁾ The argument does not suggest a causal priority for legal, political or economic factors per se.⁽¹²¹⁾ Rather, modern legal and economic theory are both described as manifestations of a broader cultural expression labelled liberalism.⁽¹²²⁾ The essential unity of the disciplines lies in their common reference to a consistent set of analytical categories which reflect a particular account of human experience : one that stresses the voluntaristic activities of individual subjects and constructs social relations as the aggregate of free exchanges between these actors.⁽¹²³⁾

(2) With this approach, there is a direct connection between market society and democracy. The autonomy of the individual and the structuring of social relationships based on free consents to restrictions to such autonomy, either contractual or through norms democratically adopted, are the roots of the system. The principle is that socialization normally occurs through consensual transactions ; however, since this does not always suffice, public institutions must intervene. Because the end of social institutions is the fulfillment of individuals' needs, restrictions on individuals'

autonomy may only come through means which are least damaging to individuals' autonomy, i.e. normative constraints democratically adopted through the majoritarian principle.

Heller developed his theory in the context of American federalism. The federalist economic analysis has a normative goal which is to determine the optimal assignment of these different political tasks to more central political units.⁽¹²⁴⁾ However, the normative goal of the economic analysis of federalism is relevant in an international context to determine what scope and structure international economic organizations should have. Further, within the context of an international economy functioning - or at least, aiming at functioning - as a market economy, the liberal view of society that it should be primarily institutionalized by consensual transactions is also relevant. Only this residual part of individuals' value choices and preferences which can not be institutionalized by the market should, in this perspective, be left to political institutions, domestic or international. However, the liberal system requires these institutions to exist or the whole construction may - and maybe now does - collapse.

The structural nature of the analysis developed by Heller allowed him to make a comparative study of the development of the institutions of the European Community, which increasingly resemble those of a federal state. My intention is to use a similar approach to study the global economy, its existing institutions being studied for heuristic purposes as the embryo of a primitive global federal state.

1.1.3. The Usefulness of the Economic Analysis of Federalism
for International Economic Institutions

(1) The usefulness of the economic analysis of federalism for a study of economic integration at the global level is not obvious. There is no such thing as a world federal state which would directly present the issue of the optimal assignment of the different functions of the positive state between the world federal government and state (decentralized) ones.⁽¹²⁵⁾ However, economic integration between liberal national economies presents exactly the same problem at the global level as at the federal one, within such large federal systems as the United States or the European Community, for example.

(2) Starting with the institutions in existence at the global level, it is the General Agreement on Tariffs and Trade ("GATT") which now serves as a surrogate of a global state, but in the limited field of international trade in goods. As we know,⁽¹²⁶⁾ there is yet no equivalent for services or investments, which are mostly dealt with in bilateral treaties. Saying that GATT serves as a surrogate of a global state is not to say that institutionally, the GATT now looks like anything like a state. The GATT is not even an organization : it is merely an agreement to prohibit quotas and reduce tariffs, and to prevent states from imposing some of the measures having an equivalent effect to quotas or tariffs.⁽¹²⁷⁾ Further, GATT deals only with international trade in goods ; international

services and investments, for example, are not under its jurisdiction. Additionally, the existing system of interfacing of the national economies is under tremendous dynamic pressure due to the globalization of the economy, and many say that the GATT is dead and that it is only a General Agreement to Talk and Talk. (128)

(3) The very institutional limits of GATT, which is only an agreement with a limited scope, combined with its experienced inadequacies, provide good evidence to suggest that it is at least partly these constitutional limits which explain these inadequacies. The usefulness of the economic analysis of federalism is to make clear that if one takes seriously the goal assigned to GATT, the development of an organization moving closer to resemble a state is a necessity. This does not mean that it is necessary to go all the way at the outset. But it is necessary to build a system allowing more internal institutional evolution than is the case now when evolution becomes needed in practice.

To fulfill the ultimate goal of GATT, we will see in the last part of this book that (i) its jurisdiction must be expanded to include services, investments, etc ... and (ii) it must be put at the center of an institutional system fulfilling at the international level some of the functions internally fulfilled by nation-states. But prior to even start the analysis leading to such conclusion, we will first review the existing GATT-system and its shortcomings.

1.2. The GATT-SYSTEM AND ITS LIMITS

In a first sub-section, we will present the GATT-system and how it is stumbling on the issue of non-tariff barriers (§1.2.1). This is logical since non-tariff barriers derive from states' use of their sovereign power to regulate their economies, which is inappropriately regulated by GATT. We will show in a second sub-section, by looking at its historical origins, that it has always been the role of GATT to limit states' capacity to adopt protectionist measures (§1.2.2).

1.2.1 GATT and the Non-Tariff Barriers Issue

The GATT-system (§1.2.1.1), while founded on principles similar to the ones at the origin of the European Economic Community, has not been able to respond appropriately to the rising issue of the last decades, i.e. the rise of so-called non-tariff barriers (§1.2.1.2). These barriers arise, by their very nature, from the dispersed power to create law, to legislate and to regulate the national economies (§1.2.1.3). And while the European Community has been able to develop some of the means to act as a surrogate for a federal state in order to create a single European market, the GATT has not been able to follow such a path and has left the world with a very inadequate set of broad and inapplicable principles (§1.2.1.4).

1.2.1.1 The GATT-System

If one follows the Balassain crude taxonomy of forms of economic integrations, GATT is not even a free trade area. Tariffs barriers against imports have been dramatically reduced since the inception of GATT,⁽¹²⁹⁾ but tariffs are still here.

The GATT can not even be understood if one reads only the articles of the documents signed in 1947. The "GATT-system" - the complex set of international treaties and institutions centering on the General Agreement - as it now stands, is a series of over one hundred agreements, protocols, procès-verbaux, etc.⁽¹³⁰⁾

The GATT contains a number of obligations, some of which have been further elaborated through separate treaty instruments often called "codes".⁽¹³¹⁾ The central features of the General Agreement are (i) the commitment by states to limit tariffs that will be applicable to imports of specific goods, (ii) the generalization of these commitments to all GATT parties through the Most-Favored-Nation clause ("MFN") and, (iii) provisions directed at preventing non-tariff barriers, and in particular, a broad National Treatment obligation.

(i) The "Tariff binding" - that is, schedules of tariff commitments, or "concessions", of Article II - is the central core of the GATT-system. Each country's "binding" sets a maximum tariff rate for each of the products listed on impressive lists. The tariff rates for each of the products are the result of the aggregate outcome of the several "rounds" of

multilateral tariff negotiations during which each country negotiated⁽¹³²⁾ detailed commitments to limit tariffs on particular items to the amount negotiated and specified in its tariff schedule.⁽¹³³⁾

(ii) Pursuant to article I of the General Agreement, which is the Most-Favored-Nation Clause of GATT, each member of GATT is obligated to treat other GATT members at least as well as it treats any other country with regards to imports and exports.⁽¹³⁴⁾ It is essentially a principle of nondiscrimination as among the nations party to GATT.⁽¹³⁵⁾

The remaining obligations in the GATT-system are designed to reinforce the basic tariff obligations.⁽¹³⁶⁾ In effect, the key role of the General Agreement is to serve as a framework of rules and procedures for the preservation of the tariff "deals" made under its auspices.

There are three major premises underlying present procedures for trade negotiations in GATT : (i) that they will be "reciprocal and mutually advantageous", (ii) that results will be generalized through the Most-Favored-Nation principle ; and (iii) that concessions will be protected from at least some non-tariff barriers by the general provisions of GATT.⁽¹³⁷⁾ The concessions would prove of little benefit to trade if countries were left free to nullify them by the use of protective devices other than tariff increases.⁽¹³⁸⁾ The problem faced in protecting the benefits of the tariff deals is that, if custom duties are a kind of subsidies provided to the protected industries (under the form of higher prices than

would otherwise be obtained if foreign competition would not be restricted), they are only one of the possible forms of subsidization.⁽¹³⁹⁾ Accordingly, a tariff concession can have value only if alternative trade barriers are held constant, or at least are not increased. Hence, the GATT has a number of rules concerning non-tariff barriers and the way nations can apply their regulations for governing trade which crosses their borders.⁽¹⁴⁰⁾

(iii) The provisions regarding non-tariff barriers cover several specific fields, but some are more general.

Historically, the most significant non-tariff barrier was the import quota (quantitative restrictions),⁽¹⁴¹⁾ which is dealt with in Article XI, XII, XIII, XIV and XV of GATT. Article XI prohibits quotas,⁽¹⁴²⁾ unless one of the detailed exceptions provided for in the subsequent articles applies.⁽¹⁴³⁾

The other various non-tariff barrier provisions of GATT cover internal taxes, anti-dumping and countervailing duties, paper work and administrative costs, valuation of goods for customs purposes, freedom of transit, marks of origin, export subsidies, government monopolies, etc...⁽¹⁴⁴⁾ However, it was impossible to cover in specific articles all the possible restrictive measures that the human mind can invent.⁽¹⁴⁵⁾ GATT, for example, does not specifically govern barriers that could result from food and drug requirements, fair packaging requirements, taxes which differ as to classes of goods which "coincidentally" fall heaviest on imported goods, etc...⁽¹⁴⁶⁾

However, GATT contains an article III which is the National Treatment obligation⁽¹⁴⁷⁾ and provides that imports shall be treated no worse than domestically produced goods, under internal taxation or regulatory measures.⁽¹⁴⁸⁾ It therefore calls for the principle of non-discrimination to be applied as between goods imported into a GATT member and goods produced domestically within that GATT member.⁽¹⁴⁹⁾

Reciprocity and non-discrimination, be it among nations (MFN) or as between goods (National Treatment) are therefore key principles in GATT. Reciprocity, however, is a strange and difficult concept,⁽¹⁵⁰⁾ making it all the more difficult to maintain - which is one of the objectives of the General Agreement which contains numerous procedures to that effect - especially in the face of rising non-tariff barriers.

1.2.1.2 Maintaining Reciprocity : the Dispute Resolution Mechanisms

GATT does not have a uniform dispute settlement procedure ; and there is no single, sharply defined dispute settlement procedure that can be distinguished from the remainder of GATT activity.⁽¹⁵¹⁾ There is, on the one hand, the system of conciliation and dispute settlement of the General Agreement and, on the other hand, specific dispute settlement procedures provided in most of the Tokyo Round Agreements.⁽¹⁵²⁾ But even in the General Agreement only, there are for instance nineteen clauses in the Treaty that obligate parties to consult in

specific instances ;⁽¹⁵³⁾ likewise, there are sprinkled throughout the GATT at least seven different provisions for compensatory withdrawal or suspension of concessions.⁽¹⁵⁴⁾

(1) The two Articles central to the GATT dispute settlement procedure are article XXII and Article XXIII.⁽¹⁵⁵⁾

Article XXII, para. 1, provides for consultations with respect to "any matter affecting the operation" of the General Agreement. If such bilateral consultations are not successful, Article XXII, para. 2, provides for the possibility of setting up a working party, open to all GATT members, including the parties to the dispute.⁽¹⁵⁶⁾ Article XXII is relatively simple and has been relied upon only in some ten cases since the inception of GATT, essentially during the fifties and sixties.⁽¹⁵⁷⁾

In contrast, approximately one hundred complaints have been raised under Article XXIII⁽¹⁵⁸⁾ - which is much more complex. Article XXIII, para. 1, provides for bilateral consultations whenever (i) any "benefit" accruing to a party, directly or indirectly, under the Agreement is "nullified or impaired" or when, (ii) there is impediment of any "objective" of the Agreement. If no solution is achieved at this stage, Article XXIII, para. 2, provides for the matter to be investigated by the contracting parties, who can make recommendations or give a ruling.

One of the major goals behind Article XXIII was to provide a means for ensuring continued reciprocity and balance of concessions in the face of possibly changing circumstance.⁽¹⁵⁹⁾ As one of the draftsmen of the ITO (Article 35 of the ITO Charter is the exact equivalent of Article XXIII of GATT) puts it,

"We shall achieve, under the Charter (...) a careful balance of the interests of the contracting States. This balance rests upon certain assumptions as to the character of the underlying situation in the years to come. And it involves a mutuality of obligations and benefits. If, with the passage of time, the underlying situation should change or the benefits accorded any Member should be impaired, the balance would be destroyed. It is the purpose of Article 35 to restore this balance by providing for compensatory adjustment in the obligations which the Member has assumed. This adjustment will not be made unless the Member has asked that it be made. And it is then the function of the Organization to ensure that compensatory action will not be carried to such a level that the balance would be tipped the other way. What we have really provided, in the last analysis, is not that retaliation shall be invited or sanctions invoked, but that a balance of interests, once established shall be maintained".⁽¹⁶⁰⁾

There is one very important aspect of the provisions of Article XXIII that pervades GATT practice and procedures of dispute settlement. When invoking Article XXIII, a GATT Party must argue that benefits it expected under GATT are "nullified or impaired".⁽¹⁶¹⁾

From a survey of the preparatory work as a whole, Prof. Jackson concluded that those who drafted GATT Articles XXII and XXIII had several goals in mind.⁽¹⁶²⁾ First, they wanted the

two Articles to be the framework of a dispute settlement procedure.⁽¹⁶³⁾ Second, they had in mind that Article XXIII would play an important role in obtaining compliance with the GATT obligations, and the analogy with the concept of retaliation was used.⁽¹⁶⁴⁾ Third, these provisions were to provide a means for ensuring continued reciprocity and balance of concessions in the face of possibly changing circumstances.⁽¹⁶⁵⁾ Thus, Article XXIII can be invoked in the absence of any breach of GATT obligations.⁽¹⁶⁶⁾ The concept of nullification or impairment is related to the idea that a complaining party could have "reasonable expectations" ;⁽¹⁶⁷⁾ and it is explicitly recognized in GATT practice that nullification or impairment is not coexistent with a breach of GATT obligations. A breach of obligation is neither a sufficient nor a necessary prerequisite for the invocation of Article XXIII.⁽¹⁶⁸⁾ Indeed, the concept of nullification or impairment relates to the idea that there is a balance of benefits derived under the Agreement which is to be preserved. Thus, GATT law generally doesn't rest on conventional ideas of legal obligations per se, but on a root concept of reciprocal and mutual "benefits".⁽¹⁶⁹⁾ The scope of the non-violation nullification or impairment remedy will accordingly be determined by the exact meaning of the term "benefit... accruing under the Agreement".⁽¹⁷⁰⁾ However, what the benefits under the Agreement are is very unclear. The truth of the matter is that the common purpose of the procedures for the settlement of disputes is not to ensure compliance with law, but to arrive at settlements acceptable to the parties concerned.⁽¹⁷¹⁾ It is

not a matter of sanctioning a breach of a rule, but of restoring a balance of advantages.⁽¹⁷²⁾ Such balance is considered to be restored when the parties reach an agreement that it is so ...⁽¹⁷³⁾ GATT is therefore treated as a flexible instrument of negotiation in the field of commercial policy and not as a system of legally binding rules.⁽¹⁷⁴⁾

Article XXIII is therefore a provision to keep a certain continuity of advantages, of benefits to the contracting parties in GATT in a changing environment. However, the value of the "benefits" being uncertain, it is no wonder that the GATT dispute resolution process is more a matter of bargaining than of judicial interpretation

(2) The main problem as identified by prof. Jackson is that :

Beyond the four protectionist devices discussed above [the tariffs, the quotas, subsidies and state trading monopolies], there is a large number of other measures. The discovery of new protectionist devices appears to be an endless process. As soon as the international system establishes restraints or regulation on a particular protective device, government officials and human ingenuity seem able to turn up some other measures to accomplish at least part of their protective purposes. Consequently, it can be argued that any international regulatory system must be designed so as to cope with the constant change in protectionist techniques."⁽¹⁷⁵⁾

The existing system - to permit duties ; to attempt to prevent the most obvious forms of non-tariff barriers ; and to provide for a forum of negotiations for the reduction of tariff barriers - makes the conduct of multilateral trade negotiations

manageable. All kind of protection except duties are either forbidden by some specific provision, or covered by the "non-violation nullification or impairment of a benefit under the Agreement" mechanism.

But with the increased globalization of the economy, the unfinished work as to non-tariff barriers has become more crucial. Attempting to design a system "so as to cope with the constant change in protectionist techniques" means developing institutional mechanisms much more advanced than the ones existing in GATT as it exists today. And so far, GATT has not been able to give to itself the appropriate means it requires to fulfill its function.

1.2.1.3 Success and its Limits : the Rise in Non-Tariff Barriers

(1) Tariff barriers have been dramatically reduced over the seven Rounds of tariff negotiations there has been so far.⁽¹⁷⁶⁾ In the United States, the average tariff declined by nearly 92 percent over the 33 years spanned by the Geneva Round of 1947 and the Tokyo Round.⁽¹⁷⁷⁾ Simultaneously however, the growth of non-tariff barriers in the 1970s and in the 1980s has been such that many observers believe that it offsets the liberalization of trade that tariff reductions implied.⁽¹⁷⁸⁾ Many such non-tariff barriers are micro barriers found in all kinds of regulations dealing with product standards, certification requirements, all sorts of norms, etc... However, other non-tariff barriers are

macro, very visible, barriers. For example, states have increasingly adopted a practice of agreeing to so-called Voluntary Restraints Agreements, which have the same effect as quotas.⁽¹⁷⁹⁾ A Voluntary Restraints Agreement consist in a unilateral action by an exporting country to limit the exports of its producers of a given product to a given importing country, in order to avoid the imposition of unilateral quotas by the importing country. It is barely "voluntary", and usually results from negotiations between the importing and exporting countries, which allows more flexibility than if a quota would be imposed.⁽¹⁸⁰⁾ Most Voluntary Restraints Agreements are a violation of Article XI of GATT, but the enforcement of GATT is impossible because no party with access to enforcement procedures can be found.⁽¹⁸¹⁾ The country restraining exports will hardly complain against itself ; the importing country, which is the most affected, will hardly complain either since it requested the "voluntary" restraint ; other countries will find it awkward or difficult to complain since they will find it difficult to demonstrate that they are harmed, even though this is often the case, or since they often use themselves the same type of devices.⁽¹⁸²⁾

(2) It must be kept in mind that non-tariff barriers are felt as a major obstacle to economic integration because of the increased openness and interdependence of the national economies. Despite its limits in the field of non-tariff barriers, GATT should be credited for this success.⁽¹⁸³⁾ The dire predictions

made by some today with regards to the future of GATT are remnants of something which already happened with regards to the European Community in the late 1970s and early 1980s. The generally held view at that time was that the European Community was dead, that the future of Europe was bleak, that Europeans would never manage to overcome their divisions and that people with a future should move to the Pacific shores...⁽¹⁸⁴⁾ Today, the European economy is one of the most dynamic in the world, and the institutional crisis in the late 1970s and early 1980s, as well as europessimism,⁽¹⁸⁵⁾ appear as signs of a growth crisis : the incredible economic expansion in Europe during the first three decades after World War II had simply outgrown the institutional structure set in place by the Paris and Rome Treaties.

(3) The further the process of economic integration proceeds, boosted by a reduction of discriminations in the forms of tariff barriers, the more noticeable non-tariff barriers seem to become. This is so true that in 1974, Victoria Curzon could write that in the contexts of both the GATT and the European Community, a great deal was being said on the relative unimportance of tariffs and the great importance of non-tariff barriers to trade.⁽¹⁸⁶⁾ She was also noticing that a widespread view at the time was that, given that non-tariff barriers are a tremendously difficult problem highly charged with political overtones, nothing much could be done in the visible future to liberalize world trade.⁽¹⁸⁷⁾ This was partly because machinery and principles

for dealing with non-tariff barriers still had to be worked out for the most part, and it was highly questionable whether or not sufficiently strong mechanisms of international control over non-tariff barriers could be developed to enforce the implementation of agreements to reduce them, nor to exert pressure for their gradual reduction.⁽¹⁸⁸⁾ The successes of the European experience brings hope for reforms at the global level.⁽¹⁸⁹⁾

1.2.1.4 Non-Tariff Barriers and the Power to Create Law

What is so perplexing about non-tariff barriers is that they are intimately related to the claims of states to a sovereign authority to legislate. And while tariff barriers are relatively easy to deal with because they are easy to perceive, feel and understand, non-tariff barriers are of such a degree of diversity that they are difficult to grasp and compare. But their significance for economic competitors is clear.

(1) In a unitary state, there are not more non-tariff barriers to internal trade than tariff ones : the laws applying on the territory (or, if one prefers, the national market) being the same everywhere,⁽¹⁹⁰⁾ the only element determining the outcome of the competition between the economic actors is normally their relative efficiency in the context of the rules of the game as settled by state law. As soon as there are different sovereigns over a given economic space - over a given "market" where economic actors compete - the competition between the

economic actors is necessarily "distorted". One can take the simple example of a producer X in a country A, willing to compete against a producer Y in a country B imposing a tariff of 33.33% to the import of the type of widget produced by X as well as Y ; obviously, X will need to have costs at least 25% lower than those of Y to be able to compete in B.⁽¹⁹¹⁾ If A and B negotiate to eliminate B's tariff on widgets (for example, because A reduces its own tariff on some other item), X and Y should be able to compete on more equal terms. However, this may not last if A and B have not covered the possibility that B may impose a non-tariff barrier having exactly the same effect for X than a tariff barrier. For example, B may impose that widgets be sold in B only in packages produced by a producer Z, which happens to be located in B and to have the monopoly of that type of packages. Imagine that the mandatory package serves no purpose (other than the one of increasing X's costs by, say, 1/3), then X is in no better position than previously ; A will get mad, and may eventually retaliate (which possibly should actually reduce B's tendency to play that kind of tricks).

I have made my non-tariff barrier example obvious, and in my story, B appears as the bad guy in an obvious manner. But imagine now that A has a genuine concern for its environment : recently, producers of beer in B have been using a new type of package which is very convenient, light and appeals to consumers : aluminium cans. They have only one defect : people throw them anywhere, and because they are not biodegradable, they may remain there for eternity if no one comes to clean-up. The environment

is getting disgusting ; B's government may have to raise taxes because of the need to clean up ; and therefore B's government is scared : it may not be re-elected at the coming elections, either because the environment will be disgusting or because it will have raised taxes. B has been considering several alternatives, and came to the conclusion that the best solution is to create a mandatory refund system : producers of beer will be allowed to sell their product in aluminium cans only if they undertake to repurchase them from retailers or consumers at a statutorily defined refund value. People were throwing their cans anywhere because of their lack of value ; now they will collect them ... The problem for us is not that the new statute will increase X's costs : it will also increase Y's, and the cost increase is logical since what B is doing consists in internalizing the cost of pollution on producers (who can pass it on to consumers, depending on demand elasticity). But the statute may very well increase X's costs more than Y's : X is an exporter in B, and if B's market is small for X, the cost of adapting its products to B's market requirements may be substantial, say, for example, 1/3. But should B be blamed for adopting the new statute ? The answer to this question will be found in Part II. The lesson we can draw at this stage is that even for competitors competing on a market undistorted by tariffs, but operating from the territories of separate states, their activities being subjected to different state jurisdictions, different laws will apply to them, and therefore they will not play exactly the same game.

(2) One must notice that if this is true at the international level, it is also true for competitors from different states of a federal union, as long as the states of the union keep some degree of sovereignty. The fact that there is "double sovereignty" over the territory of the union - that is the union-wide sovereignty of the federal or federal-like authority, and the decentralized sovereignty of each state - combined with a possibility for the federal authority to preempt state authorities in order to level the playing field eases the problem of interfacing of the state-economies ; it does not eliminate the fact that competitors do not all play by exactly the same rules, as long as the states of the union remain meaningful creators of norms. Consequently, non-tariff barriers can not be purely and simply prohibited at the international level since they do exist even in federal systems. The treatment of non-tariff barriers requires a much more elaborated theoretical analysis than the elimination of tariffs.

1.2.1.5 Law and Markets

(1) The fact of the matter is that what we call a "market" is a set of behaviours and relations that are, in part, constituted and constrained by law.⁽¹⁹²⁾ The law constructs social relationships on the market inasmuch as it controls some "natural" behaviour. It is therefore impossible to speak of markets except in the context of specific legal institutions which make them possible.⁽¹⁹³⁾ A plurality of states implies a

plurality of laws. Even within federalized markets, market competition therefore always differs for companies established on the territories of different states, even in the most integrated multi-state economies.⁽¹⁹⁴⁾ It might at times seem unfair from the point of view of economic competitors that they do not all play by the same rules, but in many instances, this is an unavoidable consequence of the federal model. The persistence of distortions in federal states such as the United States or the European Community implies that if economic integration is to be extended at the global level, a solution to the problem of the development of non-tariff barriers has to be found, but knowing that conflicting policies and rules can not be entirely eliminated. What must be found is some sort of institutional mechanisms resolving the conflicts where they exist and in those areas where they can be resolved.⁽¹⁹⁵⁾

(2) The difficulty with non-tariff barriers is political : their reduction requests that a system be created which will restrict the possible abuse of the sovereign right to legislate. The difficulty then turns out on finding the rationale defining what is a proper use of sovereignty.

In this respect, the parallel made between the European Community and the GATT is less artificial than may have appeared so far. With all their differences in structure and nature, the GATT and the European Community both have to be understood as two functionally different expressions of the same liberal conception of sovereignty.⁽¹⁹⁶⁾ This is little surprising once it is

recalled that it was primarily the GATT which supplied the conceptual and legal framework within which the negotiations on the core of the Community, i.e. on the Common Market and, more specifically, the free movement of goods, took place.⁽¹⁹⁷⁾ If Community law represents a wholly new legal order, the binding power of which is much stronger than that of ordinary international law, which is a major difference with GATT law, the two systems share the same liberal inspiration.⁽¹⁹⁸⁾ They can both be thought as international extensions of the principle of democratic constitutionalism.⁽¹⁹⁹⁾

There are certain fundamental differences between the GATT and the European Community :

(i) As we have already said, GATT deals only with trade in goods and is not even a free trade area, while the European Community provides for total freedom of movement for goods, services, people and capital.

(ii) While GATT is not even an organization, and can lead to the creation of common norms almost only during rounds of negotiations - such as the Tokyo or Uruguay Round - the European Community comprises a whole machinery of central norms creation to adopt common laws when needed.

(iii) Finally, a key difference is that in the European Community, private parties themselves have some powers to enforce on reluctant governments the commitment they made,⁽²⁰⁰⁾ while GATT - even though it is in legal form similar to the Treaty of Rome - in effect is an intergovernmental agreement of the ordinary kind.⁽²⁰¹⁾ It

did not create rights for the citizens of its parties. The GATT is a foundation of individual rights only to the extent that these may be provided by implementing national legislation.⁽²⁰²⁾ Even though, in their founding principles, the GATT and the European Community are therefore strikingly similar, in particular with respect to the principle of non-discrimination, which is at their core, their practical consequences for individuals and companies, as well as their inherent capacity for evolution, are totally different.

(3) Our analysis leads us to the conclusion that GATT is and ought to be an instrument restricting states' capacity to create certain types of laws - which we have yet to identify. An historical analysis of the origins of the GATT-system will show now that from the very beginning, such was the function of international free trade treaties.

A pattern of events leading to the creation of a free trade regime can be found. Parliaments have a natural tendency to be protectionist : their members, because they want to be reelected, tend to be very sensitive to highly vocal local interests ; and failing firms or industries tend to be highly vocal in requesting protection from foreign competitors. Typically, states executives, who institutionally tend to represent more the interests of the nation than sectorial interests,⁽²⁰³⁾ need to find a way to go around protectionist parliaments to prevent them from adopting protectionist measures, which may undermine the

foreign policies they desire to pursue. A solution for states executives is to negotiate international treaties, and to have them somehow binding upon parliaments. We will see that this pattern has taken various forms in history.

1.2.2 The Historical Origins of the GATT-System

The emergence of the GATT as the central international trade institution is a development that none of the countries participating in the drafting of the General Agreement had anticipated.⁽²⁰⁴⁾ Nevertheless, the GATT can be said to be a reflection of certain views that dominated the thinking on trade matters of US diplomats in the 1940's.⁽²⁰⁵⁾ There was not necessarily consciousness of the underlying reasons for the substantive content of the norms of GATT, for GATT was a codification of the basic ideas of the système des traités of the nineteenth century.⁽²⁰⁶⁾ In this sense, GATT is an example of an evolved rather than a consciously invented order.⁽²⁰⁷⁾ What the founders of GATT knew was that the système des traités had worked for quite a long time ; they associated the disasters of the great economic crisis of the inter-war period, and maybe even of World War II, to the abandonment of its central elements.⁽²⁰⁸⁾ For this reason, they emphasized and made formal what they perceived to be the basic elements of the system.⁽²⁰⁹⁾

1.2.2.1 The Système des Traités

(1) Until the middle of the nineteenth century, the international exchange of goods had been hampered by countless restrictive practices.⁽²¹⁰⁾ States were trying to achieve self-sufficiency by mercantilistic policies modeled on those adopted by France in Colbert's day.⁽²¹¹⁾ Then, several treaties signed in the 1860s placed the commercial relations of the main trading countries of Western Europe on a new basis and inaugurated a short but significant era of virtual free trade.⁽²¹²⁾

Traditional explanations for the birth of the so-called système des traités are quite confused. What is puzzling is why there was need for treaties at all to achieve such a result : tariffs being national statutes, why does a state need a treaty to change its own law ? Reciprocity, which is the traditional rationale for entering into international commercial treaties, is no explanation in itself. The Cobden-Chevalier treaty, between England and France, dates back from 1860. However, prior to the Treaty, England was already pursuing a unilateral policy of free trade. Why did the French decide that they needed a treaty to change their own law then ?⁽²¹³⁾ It is certainly not because they were getting "reciprocal" concessions from England. For one thing, reducing tariffs is not a "concession" as is generally believed : it is tariffs which are harming the country imposing them, and not their reduction because tariffs increase domestic prices while their reduction diminishes them. England knew it very well at the time, and was pursuing a unilateral policy of relatively free trade.⁽²¹⁴⁾

The normal method of reducing duties in France was to submit a new tariff for the approval of the legislature.⁽²¹⁵⁾ But Napoléon III knew that the protectionist majority in the Chambers would never accept substantial tariff reductions.⁽²¹⁶⁾ So he approached the problem in another way : the French Constitution gave the Emperor the right both to sign and to ratify commercial agreements with foreign governments without submitting them to the Legislature.⁽²¹⁷⁾ A tariff embodied in a trade treaty became law even if the Chambers objected.⁽²¹⁸⁾ Thus, in 1859, tentative approaches were made to the British government concerning the possibility of initiating tariff talks.⁽²¹⁹⁾ The British government was of the opinion that a country should fix its own tariff without reference to those of other countries.⁽²²⁰⁾ However, it appreciated the difficulties facing Napoléon III, and agreed to the French request.⁽²²¹⁾ The British "concessions" were included in Gladstone's budget in 1860,⁽²²²⁾ but the token reductions of the British tariff being on an unconditional Most-Favored-Nation basis benefited to all countries.⁽²²³⁾

(2) The treaty between France and the Zollverein was adopted for similar reasons, but this time, to go around German protectionism. The French concessions in the anglo-French treaty were made to Britain alone, which means that France had then two tariffs : moderate duties were levied upon imports from Britain, but the old prohibitions and high duties remained in force as far as other countries were concerned.⁽²²⁴⁾ German manufacturers then wished to compete in the French market on equal terms with

their British rivals.⁽²²⁵⁾ But in order to secure the advantages of the moderate French tariff, the Zollverein had to offer the French government concessions similar to those already granted by Britain.⁽²²⁶⁾ Just as Napoléon III had been unable to reform the French tariff by the simple method of securing the passage of a new tariff law, so the Prussian officials responsible for commercial affairs were unable to recast the German tariff by submitting the necessary changes to the General Conference of the Zollverein.⁽²²⁷⁾ Under the constitution of the Zollverein, any state represented at the general conference could exercise its veto, and in these circumstances, it was useless to submit a far-reaching reform to the conference.⁽²²⁸⁾ The only way out of the impasse was the one already adopted by Napoléon III - namely to embody tariff changes in a commercial treaty with a foreign nation.⁽²²⁹⁾ The Zollverein was not a permanent institution and its treaties were due to expire in 1866. If the German tariffs were recast as the result of a commercial treaty, the Prussian government could include the terms of such an agreement in the treaties which would in due course have to be made with other states for the renewal of the Zollverein.⁽²³⁰⁾ Those states in the customs union which opposed the lower tariff would then be faced with the choice of accepting low import duties which they disliked or of leaving the Zollverein.⁽²³¹⁾ No state opted for the second possibility and thus, when the German customs union was renewed in 1886, the new tariff came into force.⁽²³²⁾

Within a short time, Western Europe was covered with a network of low tariffs, Most-Favored-Nation treaties.⁽²³³⁾ However, it is to be noticed that no attempt was made to link the agreements by a general multilateral treaty.⁽²³⁴⁾ The system however proved extremely fragile : it was vulnerable to the depression of the 1870's, and was short-lived.⁽²³⁵⁾ But the point is made that international trade treaties were made mostly because of constitutional law problems in the adoption of free trade policies - namely, because of the clear susceptibilities of "representative" assemblies towards the interests of producers.

After the death of the système des traités, several economic depressions and two world wars ensued. It is only after World War II that the struggle to create a regime bounding protectionist parliaments took off again.

1.2.2.2 The Building of a Multilateral System after World War Two

(1) The United States dominant economic position after World War II gave it the power to lead the restructuring of post World War trade.⁽²³⁶⁾ The regime set in place was an expression of the views held by the US State Department diplomats as to what should be the appropriate form for the new international economic order.⁽²³⁷⁾ It stemmed from two strands in American economic policy.⁽²³⁸⁾ The first strand was that which focused on United States "reciprocal trade agreements", and which began with the enactment of the Reciprocal Trade Agreement Act of 1934 by which

Congress granted to the Executive the authority to enter into trade agreements.⁽²³⁹⁾ During the period from 1934 to 1945, 32 such trade agreements had been negotiated and accepted by the United States, and almost all the clauses in GATT can be traced to one or another of the clauses contained in these trade agreements.⁽²⁴⁰⁾ The second strand in American policy was the development of ideas during World War II that recognized the need for international economic institutions to prevent the type of "beggar-my-neighbor" policies that had been so disastrous to world trade during the inter-war period and which, in the minds of many leaders, were responsible to a great degree for World War II itself.⁽²⁴¹⁾

(2) On the substantive level, United States negotiators sought to achieve the goals of free, nondiscriminatory trade.⁽²⁴²⁾ Their position was that a liberalized system of international trade, based on non-discrimination and the elimination of trade barriers, was essential to world peace.⁽²⁴³⁾ The rules governing world trade were to be developed and enforced by an International Trade Organization which, together with the World Bank and the International Monetary Fund, was to compose a complete system of economic cooperation through international institutions.⁽²⁴⁴⁾ With regards to trade, the US State Department's position was that, in general, non-tariff barriers should be abolished forthwith or eventually converted into tariffs, and that all tariffs should be progressively reduced through international negotiations.⁽²⁴⁵⁾

As to the means to use to achieve these goals, the United States view was that - in broad line - all non-tariff barriers should be flatly prohibited within the framework of a comprehensive code governing world trade.⁽²⁴⁶⁾ The code would seriously limit the right of individual governments to interfere with the free flow of private trade.⁽²⁴⁷⁾ Transgression of the code would be an unlawful act and an institutional body would be created to interpret and, if need be, enforce the code.⁽²⁴⁸⁾

(2) Prior even to start the negotiations which were to lead to the creation of this system, the United States trade officials had to cope with the agent of the American industry - with the US Congress. The Administration needed to obtain congressional authorization prior to initiate the negotiations, and the chance of making a substantial across-the-board reduction in tariffs had to be abandoned in the face of opposition by the Congress.⁽²⁴⁹⁾ In 1945, the Administration managed to secure legislative authority for Presidential right to negotiate up to a 50 percent reduction in existing tariffs, provided it got reciprocal concessions, by a renewal of an authority it had received from Congress already in 1934. However, the President was committed to use that authority in the context of item-by-item negotiations designed to preclude tariff reductions that might injure American producers.⁽²⁵⁰⁾ In addition, the Administration was also pledged to insert an "escape clause" in all forthcoming trade agreements, reserving the right to withdraw particular concessions at a later date if they did in fact injure domestic

producers.⁽²⁵¹⁾ By definition, competition injures inefficient producers ; it is obvious that with the constraints imposed by the US Congress, US negotiators could not achieve dramatic results.

(4) To achieve a rational re-ordering of world trade mechanisms, an international conference on trade and employment was held at Havana in the winter of 1947-1948.⁽²⁵²⁾ The conference approved the charter of an International Trade Organization ("ITO") which included six agreements : commercial policy ; restrictive business practices ; commodity agreements ; employment ; economic development and international investment ; and a constitution for a new United Nations agency in the field of international trade.⁽²⁵³⁾ The ITO charter, however, never came into existence, mostly due to the American refusal to ratify the Charter.⁽²⁵⁴⁾ The reasons for this refusal were manifold, and included a general "cold war" disenchantment with international institutions, the revival of protectionist sentiments, and the disaffection of the business community. In particular, the attempt to draft detailed agreements attempting to reconcile competing demands from the outside and from within the United States was partly responsible for the failure of the ITO.⁽²⁵⁵⁾ After all the compromises that had been necessary to reach an agreement with the rest of the world, the American public opinion had the impression that whereas the United States would have to play by the rules, every nationalistic trade-control device and every excuse for using it was in the

document.⁽²⁵⁶⁾ Whatever the reasons for the fate of the ITO, the world was left with the GATT as a very poor substitute to a much more complete institution.⁽²⁵⁷⁾

(5) An inherent problem in the approach of US negotiators was that they failed to appreciate the need for an appropriate institutional framework within which states could resolve their conflicts streaming from their permanently diverging interests, and that they did put faith almost entirely in substantive agreement.⁽²⁵⁸⁾ US negotiators considered that, in the area of trade policy, the ITO primary purpose was to apply and enforce substantive rules of law.⁽²⁵⁹⁾ In a very important sense, they were the victims of their own "legalism".⁽²⁶⁰⁾ What was needed was not so much an agency to enforce a detailed catalogue of obligations more or less adapted to a changing economic environment as an institutional framework within which countries might examine the particular circumstances of specific trade policies, thereby, if possible, identifying their common interest and working out mutually acceptable solutions.⁽²⁶¹⁾

International regimes, particularly when they have to deal with issues so much charged with political overtone, derive their legitimacy less from their ability to implement substantive legal rules than from their capacity to reshape the context within which states conceive their self-interest.⁽²⁶²⁾ And in this respect, GATT - our poor substitute for the ITO - is a failure.

It is very important to distinguish this view that it is necessary to have an institutional arrangement allowing to reach a consensus on controversial issues from what are sometimes

called "pragmatist" views of the GATT - that is, from an approach to the drafting and administration of international agreements in which emphasis is placed on mutual agreement on objectives, and in which rules concerning rights and obligations are considered as mere formalities to be avoided whenever possible.⁽²⁶³⁾ On the contrary, since the different policies pursued by the different countries represent competing values, it was important to create strong procedures for clarifying the common interest of the various trading countries and for establishing the impact of commercial policies.⁽²⁶⁴⁾ The ITO was not primarily designed to fulfill that function, and the GATT as it came into being was of course completely illsuited to this desired role.⁽²⁶⁵⁾ Ironically, though, the very institutional weakness of GATT allowed it through time to rise above the legalistic confines of the General Agreement, through the development - still insufficient - of many improvised procedures and codes.⁽²⁶⁶⁾

(6) In a very real sense, the latent dispute between proponents of "legalism" and of "pragmatism" within the framework of the GATT was, and still is, a false one.⁽²⁶⁷⁾ Both approaches rest upon a single, naive view of the law.⁽²⁶⁸⁾ Both view law as substance - as substantive rules prescribing rights and duties for all parties for all future problems. Whereas legalists view substantive rules as inherently desirable, pragmatists are more inclined to see detailed substantive rules as obstacles to the achievement of the common long-term objectives.⁽²⁶⁹⁾ This jointly held view of the nature of law

tends to obscure the importance of procedures, of the legal process.⁽²⁷⁰⁾ Law is not solely or even primarily a set of substantive rules : it is a set of procedures adapted to the subject matter and designed to resolve conflicts that can not be foreseen at the outset.⁽²⁷¹⁾ As procedures and process, international economic law is what allows states to identify their common interest in complex situations and to formulate short-term policies for the achievement of the long-term objectives.⁽²⁷²⁾ Part of the history of GATT is precisely a movement away from the naive view of law and toward an increased interest in procedures.⁽²⁷³⁾ Through time,

The legalists found that substantive rules requiring the abolition of trade barriers did not make that much difference, and the pragmatists found that good will and ingenuity could achieve little in the way of reducing trade barriers and promoting international trade unless those qualities were accompanied by procedures for identifying underlying economic problems that made barriers inevitable, for promoting staged multilateral moves toward the liberalization of trade barriers where it was difficult for any one contracting party to move alone, and for providing governments with a mechanism or an excuse to do that which they wanted to do but were unable to do because of domestic pressures.⁽²⁷⁴⁾

An international conflict over trade resulting primarily from an internal conflict over the distribution of wealth and power,⁽²⁷⁵⁾ trading countries need a system of rules to define the room within which unilateral action is permissible, which allows them to resist against unwarranted local demands for protection.⁽²⁷⁶⁾ Such rules and procedures can also ease the delegation of decisions to the executive by the legislative branch without the danger that executive discretion would be effectively untrammelled.⁽²⁷⁷⁾

(7) The existing rules on trade are ill-adapted to today's economy. The international economic order set in place in the late 1940s had for its first purpose to formally organize the economic relations between countries on a rule-oriented basis.⁽²⁷⁸⁾ It has helped to achieve a high level in interdependence among national economies.⁽²⁷⁹⁾ However, the development in interdependence has been outpacing the development of political thought and institutions to cope with so much change.⁽²⁸⁰⁾ As an agreement on a number of basic principles or norms of behaviour supposed to allow the orderly evolution of an international market economy, GATT appears to be moribond.⁽²⁸¹⁾ GATT now has become little more than a forum for multilateral (or even bilateral) commercial diplomacy and no longer embodies living norms.⁽²⁸²⁾ In particular, the fundamental principle of non-discrimination has been seriously weakened.⁽²⁸³⁾

We will see now how the rules of the international economic order, destined to be part of the framework of procedures leading to the adoption of norms in response to conflicting internal demands and interests, have a function which is of a constitutional nature and why it is not fulfilled now.

1.3. GATT AS AN EMBRYONIC FEDERAL STATE : THE CONSTITUTIONAL FUNCTION OF GATT

As we know, GATT came to fill the void left after the "death" of the ITO.⁽²⁸⁴⁾ However, there is a host of misconceptions as to the nature of the void that the ITO itself was trying to fill, and which indirectly GATT is supposed to fill as a substitute. These misconceptions seriously burden the debate as to what kind of improvement is needed in GATT for a better fulfillment of its function. As we have seen, common sense or economic logic is no guide as to why governments generally prefer to reduce trade barriers on the basis of multilaterally agreed principles and rules rather than unilaterally on a purely autonomous basis.⁽²⁸⁵⁾

(1) The purpose of an institution such as GATT is not obvious. According to liberal economic theory, a country which reduces its barriers to imports is the first to benefit because it thereby achieves a more productive allocation of its national resources.⁽²⁸⁶⁾ To obtain this benefit, the country does not need simultaneous liberalization in other countries.⁽²⁸⁷⁾ The purpose of GATT negotiations and of its legal framework of rules on non-discrimination, reciprocity, etc... is therefore not directly to ensure a fair distribution of economic sacrifices among countries.⁽²⁸⁸⁾

Although the GATT-system is based on liberal economic principles, it is important to remember that it does not prescribe free trade per se.⁽²⁸⁹⁾ After all, it is an agreement on tariffs, on a stabilization of the levels of protection among its signatories, and on rules to prevent unrestrained unilateral variations of these levels.⁽²⁹⁰⁾

To understand why it is important to reach an agreement on tariffs, one has to realize that the level of protection a state provides to its industries is only of partial concern for the international community, for the mere reason that the cost of protection is mostly borne by the constituents of the protecting country itself.⁽²⁹¹⁾ It is the unpredictable changes in the level and forms of protection which are a concern for other countries and foreign competitors. This is so because if it is left to the absolute discretion of states to change the "rules of the game" at any time, for whatever reason and under whatever forms, this creates uncertainty for firms.⁽²⁹²⁾ This uncertainty is most costly for foreign firms because under modern conditions of production for international markets, firms must plan years in advance their production capacities, distribution systems, etc. If uncertainty in the international trading system is such that it upsets firms plan and dispositions, with consequences such as excessive investments to serve the demand on disappearing markets, unemployment, etc... then the constituents of foreign countries will be made to bear a heavy share of the cost of protection, and this is of concern for the international community.⁽²⁹³⁾

When examined more closely, the principles and rules of the international economic order can be seen as serving two constitutional functions, one "internal", the other "external" :

(i) The external "constitutional" function consists for states in providing to themselves rules having the same role for states that contracts, partnerships or companies have for constituents : they ensure a certain discipline and allow order so that governments can act on the basis of what can be the expected behavior of other governments in a given situation.

(ii) The internal constitutional function is the most interesting for our purposes. In the field of trade, GATT is in essence - or is supposed to be - a document helping governments to resist against domestic demands for protection against competition coming from abroad. By providing to governments an excuse for not being responsive to demands for protection, GATT reduces the political cost of sticking to free trade, and allows politicians to follow the policy which is in the best long term interest of their country. In democratic welfare states, this is a constitutional function, the document being directed against a use of the state apparatus in a manner circumscribing the democratic process in favor of sectional interests.

To understand the problem, one has to realize that protectionist measures amount to a redistribution of income or wealth, mostly from consumers to the protected producers.⁽²⁹⁴⁾ There is nothing inherently bad in redistributing wealth, as long as such a redistribution is decided by the People.⁽²⁹⁵⁾ Modern

states are indeed complex redistributory systems, and it is plainly legitimate for elected assemblies to redistribute income. However, a major problem with redistribution through protection is that it is not visible, and is little understood.⁽²⁹⁶⁾ Few people realize that protecting a domestic industry amounts to subsidizing it out of consumers' pockets. The predominance of domestic producers' interest in domestic political life - because of a higher capacity to organize, say, than consumers -⁽²⁹⁷⁾ therefore creates a constitutional problem. It makes it possible to use the state apparatus in the name of the general interest but for private ends.

Some mechanism must prevent the use of the state apparatus for such group interests, which is one of the essential functions of constitutional law. As Hayek puts it :

The interest which is common to all members of a society is not the sum of the interests which are common to the members of the existing groups of producers, but only the interest in the continuous adaptation to changing conditions which some particular groups will always find it in their interest to prevent. The interest of the organized producers is therefore always contrary to the one permanent interest of all the individual members of society, namely the interest in the continuous adaptation to unpredictable changes, an adaptation necessary even if only the existing level of production is to be maintained (...). The interest of organized producers is always to prevent the influx of others who want to share their prosperity or to avoid being driven out from a group by the more efficient producers when demand should decline. By this, all strictly economic decisions, that is all new adjustment to unforeseen changes, will be impeded. The viability of a society, however, depends on the smooth and continuous execution of such gradual changes and their not being blocked by obstacles which can only be broken down when sufficient pressure accumulates. (...) . But every changes of this kind will hurt some organized interests ; and the preservation of the market order will therefore depend on those interests not being allowed to prevent what they dislike.⁽²⁹⁸⁾

Constitutions in liberal democratic states are partly designed to prevent a circumvention of the public system of institutions by organized sectional interests in their favor. Part of the functional role of notions they embody, such as equality, non-discrimination, etc... is to prevent a use of the state apparatus contrary to its very end as determined by the internal logic of the liberal system.

In this perspective, we will first review the external constitutional function of international trade agreements (§1.3.1), and then their internal function (§1.3.2). We will then study how this function is not properly fulfilled today by examining in some detail the internal regime of trade regulation in the United States (§1.3.3).

1.3.1. The External Constitutional Function of International Trade Agreements

(1) The function of the rules of the international trade regime as being restraints on the actions of governments for the benefits of governments - consist in the provision of rules which serve the same purposes for government as internal rules for constituents.⁽²⁹⁹⁾ By restricting the objectives that can be pursued by governments as well as the means which they can employ to reach them, the rules of the international economic order provide a certain degree of predictability about the prospective actions of other states.⁽³⁰⁰⁾ These rules have the paradoxical

result that by constraining the actions of governments, they are enhancing the capacity of states to adopt policies which will not be self-defeating. When policies are adopted through means allowed by the rules of the international economic order, there is simply no reason why they should lead to unpredicted reactions by other states (i.e. protectionism in reply to protectionism ; subsidization in reply to subsidization) which could lead to a nullification of the effects of the policy adopted in the first place.⁽³⁰¹⁾ An effective functioning of the system of rules allows the pursuit of policies with the knowledge that they are not nullifying or conflicting with policies adopted elsewhere, and therefore do not carry the risk of counter-measures which in turn can nullify the policy pursued.

(2) International competition having potentially dramatic social consequences, under the form of massive unemployment for example, this function explains why an effective international regime must comprise a safeguard clause, allowing governments to temporarily lift the application of the normal rules of the free trade regime, while it takes measures to ease the process of adaptation to new competitive conditions.⁽³⁰²⁾ Without such a clause, governments would theoretically be obliged to let competition do its job, eventually eliminating a whole branch of activity within a given state in a matter of months or years. Without such a clause, governments would be left with the sole possibility to watch people demonstrating in the street and to explain to them that life is tough, that they are too old, too

lousy, or too lazy, ... or worse, that it is their employers who have been lousy, and that they are now the ones who have to pay for it. That would be tough, particularly in election years, and governments would eventually be forced to breach their international commitment to free trade, leading to retaliation and thus destroying the whole regime.

A safeguard clause must be inserted in any free trade regime which does not provide for redistribution policies such as the ones found within a state's economy. Governments must be able to buy time to take appropriate measures to adapt their economies to new competition conditions. But any safeguard clause must be of temporary application so as not to allow indefinite protection to industries having lost their comparative advantage in the world division of labor. And it must be politically costly for governments so that they will use it only when necessary, so as not to undermine the whole system.

The external constitutional function, which is paradoxically to limit governments' capacity to adopt policies, even in the face of conflicting local sectorial demands, is therefore directly connected to the internal constitutional function.

1.3.2. The Internal Constitutional Functions

(1) Maybe partly due to the obscure origin of GATT as the major institution for the regulation of international trade,⁽³⁰³⁾ there is little understanding that it is part of the procedural constraints on domestic law-making. The GATT was

originally supposed to be only an agreement to be later administered by an organization, the International Trade Organization.⁽³⁰⁴⁾ But with the United States Senate refusal to adopt the Havana Charter on the ITO, the GATT had then to evolve to become the institution it is today.⁽³⁰⁵⁾ Its functioning is so imperfect that some say that GATT is dead.⁽³⁰⁶⁾ To say the least, it does not fulfill the function which should be the one of an international agreement on trade. We will see it by studying what this internal function should be.

(2) The ultimate constitutional function of international trade rules is to protect taxpayers and consumers from their own governments, in case they would be tempted to use the state apparatus to protect failing industries.⁽³⁰⁷⁾ In this respect, international economic obligations and the threat of lawful retaliation in case of breach, can be seen as creating the potential of a political cost which will bear on the politician's decision whether to adopt protectionist measures or not.⁽³⁰⁸⁾ This function is the ultimate goal of a free trade regime, but this does not explain why governments enter into the agreement in the first place.

Formally, governments enter into free trade regimes because they are in charge of defending the national interest, which requires to refuse to use public institutions in favor of sectional interests. It is the role of free trade regimes to protect governments from organized sectional interests which could try to influence the government to have it make use of the

state apparatus in their favor.⁽³⁰⁹⁾ This issue is just a facet of the perennial problem of checking the tendency of group action to undermine the liberty of the individual or to rival the political power of the state and of the necessity of having an effective constitutional system to prevent this from happening. However, a framework of constraints on policy options allows not only to defend the country's interests, but also the governments'.⁽³¹⁰⁾ No government can achieve its long term policy goals without a framework of constraints ensuring that the goal is not sacrificed to short-term problems, or vocal sectional interests. It is only within such a framework of constraints that a government can effectively resolve in its trade policy the perennial conflict between short-term political expediency and national welfare, between the interests of producers and the interests of consumers, or between society's desire for economic growth and its desire to avoid the structural adjustment needed for growth.⁽³¹¹⁾ Hence, the purpose of the legal framework now provided by GATT is to help governments overcome the internal political obstacles against a rationalization of the regime of imports arising from the predominance of producers' interests in political life.⁽³¹²⁾

(3) International obligations allow governments faced with demands from sectional interest to resist to these demands by pointing to the international obligations undertaken to meet the national interest. The structure of decision-making in democracy typically leads public officials to opt in favor of short-run

political gains (they want to be re-elected), and thus in favor of protection, even when their values or long-run political agenda are best served by an open market.⁽³¹³⁾ International obligations reduce or eliminate the dominance of the strategy of defection in domestic decision-making by changing the payoffs to public officials for granting and denying protection.⁽³¹⁴⁾ It allows to a certain degree, especially if reciprocal commitments have been made by other countries - and are respected - to make politically feasible a sustained policy of liberal trade.⁽³¹⁵⁾

(4) This explains why the principle of reciprocity is essential in the establishment of a free trade regime. The conclusion of an international agreement to fulfill this fundamentally domestic constitutional function is made necessary by the bias democratic institutions have toward domestic producers in trade policy making.⁽³¹⁶⁾ In principle, a unilateral liberalization of trade should be beneficial not only economically, but also politically : in liberal economic theory, a government should win votes by reducing trade barriers either because the majority of the population derives benefits from trade liberalization or because the government redistributes the gains from trade liberalization, for example through adjustment assistance programmes, in such a way that the welfare of the majority of the voters rises.⁽³¹⁷⁾ However, because of a bias towards producers in trade policy making, governments need to reduce trade barriers on the basis of reciprocally agreed principles and rules rather than unilaterally :⁽³¹⁸⁾ Given the

predominance of organized producers' interests in political life, governments can liberalize trade only if they gain their support.⁽³¹⁹⁾ And while trade liberalization is beneficial for the economy as a whole, certain industries and workers are inevitably hurt by it and will therefore use their political influence to oppose it.⁽³²⁰⁾ Reciprocal liberalization of trade holds the promise of visible export gains for other industries, and therefore helps to establish a political counterweight to the one of ailing industries. Reciprocity is the safest route to get domestic political support from dynamic industries in favor of trade liberalization to counteract the resistance of more stagnating industries.⁽³²¹⁾

(5) An effective institution allowing a liberal interfacing of national economies would fulfill a constitutional function in that it would prevent the production of domestic laws to favor sectional interests in the polity in a hidden manner. GATT does not fulfill this function today, which barely needs to be proved. This is logical because the effectiveness of the system of rules depends on the effectiveness of the mechanism of enforcement. International trade law, like most international law, is "horizontal" law : it is made, administered and enforced by the national governments to which it applies.⁽³²²⁾ It consists primarily of reciprocal undertakings by national governments to restrain their own actions and to recognize as legitimate the sanctions imposed by other governments if they fail to live up to their commitments.⁽³²³⁾ This makes the whole system extremely

fragile. Domestic rules of law are breached all the time, but this has little effect on their effectivity as rules of law because the state apparatus can always increase the means devoted to rule-enforcement. The situation is wholly different in case of violation of the rules of international trade. Actions by a government in violation of the rules will have two immediate consequences (apart from direct retaliation) : first, other governments will be less well placed to resist to domestic pressures ;⁽³²⁴⁾ second, domestic groups in situations similar to that of those given similar special treatment will find that it is only "fair" that they should be given similar special treatment.⁽³²⁵⁾ Exceptions will generalize, with an implied weakening of the rules, and increased disorder in the international economy.⁽³²⁶⁾

(6) This erosion of the rule of law and the resulting increase in disorder will be particularly difficult to resist if there is little or no recognition that it is a purely domestic interest which is protected through a commitment to the rules of the international economic order. If both government and general public opinion view internationally agreed rules as obstacles to desirable domestic action, rather than as means to resist against sectional interests, it is not surprising if they give in to political pressure to cheat.⁽³²⁷⁾ Evidently, the damage to the international economic order is not overwhelming if a state of minor importance breaches the law. The situation is wholly different for huge economic powers who have a particular

responsibility in the creation and maintenance of international order. International obligations have to be seen as an international public good - a kind of good from which everybody benefits even without "paying" for it. In case of a public good provided by voluntary action - which is the case for the international economic order - a "free rider" problem exists : if you benefit from the good whether you contribute to it or not, why contribute at all ? The public good will then generally be underproduced, unless (i) the deterrent of retaliation is effective or (ii) a single country - or a small group of countries - is large enough, relative to the rest of the world, to take responsibility for the world as a whole, to be prepared to ignore "free riders".⁽³²⁸⁾ In other words, if major market-oriented economies follow the rules, then order in the multilateral trading system is created for the world as a whole.⁽³²⁹⁾ But the weight of the open economies in the world market economy must be reasonably large for this to function.⁽³³⁰⁾

A major reason for the erosion of liberal trading lies in the fact that the United States have partially abdicated their role of leadership in maintaining a liberal world order.⁽³³¹⁾ The three main actors in the world-economy - the United States, the European Community and Japan are exploiting the system for their own short-sighted ends. Even in the United States, there is a diminishing belief in free trade, mostly because of a fundamental misunderstanding as to the meaning of its rules. Everywhere the belief is held that being a free trader means being generous to

the outside world ; that having an open economy is a cost and that all those who benefit should contribute to the expense. The misunderstanding of GATT as a constitutional document to protect national constituents is particularly damaging.

To demonstrate this, we will show in some details the process by which, in the absence of an effective international regime, interest group lobbying in the United States designs trade policy at the expense of the American consumer. The United States are taken as an example because the cost of protection there is well documented, which by no means means that the problem is met in the United States only, nor that it is worse there.⁽³³²⁾

1.3.3. The United States Example

(1) We have already mentioned that the United States have dramatically liberalized their tariff barriers since World War II.⁽³³³⁾ On the other hand however, the United States has also imposed numerous regimes of "special protection" to insulate important manufacturing and agricultural sectors from foreign competition.⁽³³⁴⁾ There are also, in the United States as anywhere else, protectionist measures hidden in thousands of regulations which do not have trade regulation as their main purpose but which commonly discriminate against imported goods. These are what is sometimes called "technical and administrative obstacles" ;⁽³³⁵⁾ they are extremely difficult to grasp, and impossible to enumerate and are very troublesome because of the difficulty of eliminating them. In addition, as Professor Jackson

"the temptation of legislators and other government officials to shape regulation or tax measures so as to favor domestic producers seems to be very great, and proposals to do this are constantly suggested." (336)

These measures pose the same constitutional law problem as the one we have identified with regard to measures directed at trade control. Because their impact is impossible to measure, we will concentrate however on trade regulatory laws which cost has been estimated by economists. But it must be stressed that the constitutional problem posed by protectionism is the same for all types of protectionist measures.

(2) Trade policy-making in the United States is shared by the US Congress and the President. The Constitution grants Congress the power "to regulate commerce with foreign nations" and to levy duties as well as other forms of taxes. (337) The President also possesses constitutional law powers relating to international trade because of his responsibility in conducting foreign relations. (338)

Some of the existing restrictions on imports are imposed by Congress itself, others are imposed by the Executive under a delegation of power by Congress, others again are resulting from a use of the President's inherent powers.

(i) In the first place, if tariffs generally speaking have been dramatically reduced since the end of World War II, there are still instances of tariff-based special protection for some industries where tariffs are 15 percent or higher. (339) It is

notorious that these remaining high tariffs have been retained by industries with sufficient political strength to guard their ancestral ramparts against the erosion of the seven GATT Rounds of tariff negotiations.⁽³⁴⁰⁾ Prior to each Round, these industries have been able to persuade a constituent-minded Congress that they can not survive without their accustomed tariffs.⁽³⁴¹⁾ This biased opinion has then translated in a reduction of the capacity to negotiate of a more globally-minded President, either under the form of a specific exclusion from the President's tariff-cutting authority, or by a special investigation that identifies "import-sensitive" industries, or simply by informal persuasion.⁽³⁴²⁾

Even more decisive exercises of congressional powers are the instances of statutory quotas.⁽³⁴³⁾ These statutes often set a rigid limit on imports, expressed as a percentage of consumption or as a residual between domestic consumption and domestic production, or they altogether ban foreign supplies from the US market.

(ii) There are then instances of delegation of congressional authority to the President to enable him to adopt protectionist measures, at the conclusion of three administrative procedures. The first of these administrative procedures is the US domestic escape clause, allowing to give a temporary competitive break to a domestic industry when foreign competition "hurts too much". The other two administrative procedures are less-than-fair-value procedures, pursuant to which a domestic firm or industry may get

a competitive break if it is suffering from some "unfair" foreign competition. While the first of these administrative procedures is not criticizable in its principle, the economics of the functioning of the other two procedures show that they sometimes lead to the creation of barriers against "fair" trade.

(a) The more political of the administrative procedures created by Congress is the so-called "Escape Clause" of Section 201 of the Trade Act of 1974.⁽³⁴⁴⁾ Under this clause, an industry may petition the International Trade Commission ("ITC") to conduct an investigation of "injury" from imports. The ITC investigates whether or not there has been or is likely to be serious injury to a domestic industry producing an article like or directly competitive with the imported article. Then the ITC reports its findings to the President and if injury or threat of injury is found, it makes recommendations as to the imports restrictions and/or adjustment assistance necessary to prevent or remedy the injury. However, the President is not legally constrained by the ITC's recommendation.

We have shown why the existence of an escape clause is an absolute necessity in the actual international trade system.⁽³⁴⁵⁾ In the absence of international redistributory policies, the set of rules and constraints applying on any given competitor on a given market vary too much from the ones applying to other competitors on the same market to consider as an inflexible rule that market competition alone should select efficient producers without political intervention.⁽³⁴⁶⁾ In

some individual situations, the competitive failure of domestic firms or industries is not due to an incapacity to compete but to circumstances which can not be blamed on the failing competitors. Additionally, it is sometimes politically impossible to abandon some sectors of activity due to the ensuing consequences (unemployment, etc...) even if domestic producers have been lousy, did not invest enough, etc... The existence of an escape clause mechanism in US domestic law is therefore not to be blamed per se. However, it should be, and was meant in US domestic law, to provide a major route for temporary protection when foreign competition "hurts too much" and makes it necessary to grant temporary relief in order to slow the pace of adjustment to changed competition conditions. But because of its strict - and necessarily strict -⁽³⁴⁷⁾ conditions of application, and because other devices could be subverted in an easier way in order to get protection from competition,⁽³⁴⁸⁾ the escape clause has become a "secondary road" to get protection. Escape clause relief has two major drawbacks from the point of view of petitioning industries : (i) it is difficult to get : an industry seeking escape clause relief must first persuade the ITC that it is "seriously injured", or "threatened with serious injury" and that rising imports are the "most important cause" of the actual injury or threat of injury ;⁽³⁴⁹⁾ then, (ii) once the ITC recommends trade relief to the President - who awards escape clause relief in a highly discretionary manner - the industry still has to persuade the President that trade relief serves the national interest more than adjustment assistance or, indeed, no

relief at all ;⁽³⁵⁰⁾ and (iii) once it is obtained, the protection will diminish year-to-year, forcing the industry to adapt to the realities of international competition.

All this explains that out of the 53 import relief petitions from 1975 to 1984, the ITC recommended trade relief in only 28 cases, was evenly split in 3 other instances, and that out of these 31 cases, the President granted relief only 13 times.⁽³⁵¹⁾

(b) Whereas the escape clause deals only with injury to United States producers from import competition, two "less-than-fair-value" administrative procedures exist to restrict imports which deal, in law, with the "fairness" of business practices used in the American market by foreigners.⁽³⁵²⁾ Countervailing duty law is concerned with the sale of subsidized exports, while antidumping law deals with sales at a price below the foreign producer's long-run costs, or below his home market-price.⁽³⁵³⁾ However, Finger and others have discovered that escape clause cases and less-than-fair-value cases in fact deal with the same thing - injury from imports and the associated gains from trade.⁽³⁵⁴⁾ For them, the functional difference between the cases which belong to one track or the other is the size and perhaps the degree of public awareness of the interest at stake, not the nature of those interests : "antidumping and countervailing duties are, functionally, the poor (or small) man's escape clause."⁽³⁵⁵⁾

The reasoning of Finger and others is the following. They start by noting that when protection is the issue, the opposed interests are domestic producers', who want import restricted, and domestic consumers' or users' who want access to foreign sources of supply.⁽³⁵⁶⁾ By specifying precisely how the interests of one group are to be taken into account, legal or technical criteria in less-than-fair-value proceedings spare policy level officials from having to decide whose interests will be taken into account and from having to explain to those whose interests are left out why this is so.⁽³⁵⁷⁾ The less-than-fair-value criteria are much more technically precise than the escape clause criteria and furthermore, the criteria are assured of a subsequent right of appeal : any interested party can appeal a less-than-fair-value determination whereas the right of court appeal evidently does not apply to escape clause findings.⁽³⁵⁸⁾ These criteria provide solid reasons for the government's decision, and allow the government to point out to the losing side that no other decision was legally possible, which thus diffuses the political costs of the decision without preventing the government from harvesting the gratitude of the winners.⁽³⁵⁹⁾ The end result is some very large transfer of income, without (almost) anybody knowing about it : the transfer of income from consumers to producers induced by protection is typically eight to ten times the net cost of protection !⁽³⁶⁰⁾

The key to the effectiveness of such technical tracks is to disenfranchise one "side" with a major interest in the decision made.⁽³⁶¹⁾ Because the mechanisms are established through

democratic processes, such a disenfranchisement is possible because the "losers" are unaware of what is going on.⁽³⁶²⁾ This in turn is possible because of misdirection and obfuscation.⁽³⁶³⁾ (i) Misdirection has to do with the fact that whereas in law the mechanism is designed to impose import restrictions only in instances of "unfair" foreign pricing, the economics of the mechanisms suggests that they will go too far and protect domestic producers from "fair" foreign competition as well.⁽³⁶⁴⁾ Less-than-fair-value mechanisms having the power to restrict imports, they will attract all those with an interest in having imports restricted and not only firms and industries beset by unfair competition.⁽³⁶⁵⁾ By design, these mechanisms weight domestic producers' interests more heavily than domestic users' : they have the capacity to impose trade restriction, but not to enhance trade...⁽³⁶⁶⁾ Firms seeking trade relief will attempt to make their needs fit the scope of the mechanism and its scope fit their needs,⁽³⁶⁷⁾ and the obscure nature of the proceedings assure that this advantage can be exploited without generating opposition.⁽³⁶⁸⁾ (ii) Such a misdirection in the establishment of less-than-fair-value procedures goes on because of obfuscation.⁽³⁶⁹⁾ Technical procedures are incomprehensible without lengthy training.⁽³⁷⁰⁾ They don't attract news media attention, tend to obscure, and this allows the government to serve the advantaged interest group without being called to task by the disadvantaged ones.⁽³⁷¹⁾

Interestingly, Finger and others were concluding that if you are politically obscure, the lower track provided by administrative procedures will work for you, but that if you are politically prominent, it won't.⁽³⁷²⁾ Highly visible petitions will attract political opposition : because they have no technical outlet, buyers will press their interests at the political level, and hence such cases will escalate into political issues.⁽³⁷³⁾

This is precisely what happened in the major instances of protection in steel, auto, etc... industries, where the use of the inherent powers of the President have been used by highly politically visible and vocal industries.

(iii) Highly visible industries have therefore been looking for other modes of getting protection. The legislative conditions (imposed by GATT obligations) to get escape clause relief proving difficult to meet, one of the roads taken was to make use of the inherent responsibility of the President for the conduct of foreign policy in order to get him persuade foreign governments both to limit their exports to the United States and to administer the necessary restraints.⁽³⁷⁴⁾ This has become the favored means of protecting large troubled industries,⁽³⁷⁵⁾ the President being able to claim credit both for defending the principle of free trade and for defending the industry. In addition, the President can usually conceal the (huge) cost of protection from the public. Further, quantitative restraints have the preference of both domestic producers and foreign exporters in comparison with high tariffs.

(a) Domestic producers prefer quantitative restrictions because, first, their share of the market is more certain ; second, domestic prices are less variable ; and third, it is easy to get protection under this form because if the public understands the impact of tariffs, it is easily persuaded that quantitative restrictions barely affect prices.⁽³⁷⁶⁾

(b) Foreign exporters prefer quantitative restrictions for reasons varying whether they are traditional suppliers or new entrants on the US market.⁽³⁷⁷⁾ Traditional suppliers like quantitative restrictions because, first, this normally does not cut back their own exports and limits third countries producers' increases in market shares ; and second, the restrictions imposed tend to improve price levels in the United States.⁽³⁷⁸⁾ Even aggressive new entrants tend to like quantitative restrictions because scarcity rents are artificially created on the American market which, because of the way quantitative restrictions are customarily implemented in the United States, go to the restrained exporters (who can use them to export more effectively on third markets...)⁽³⁷⁹⁾

Quotas please many in international trade. What, then, is the problem with them ? Special protection generally speaking does not, for the most part, freeze the status quo in the United States.⁽³⁸⁰⁾ A substantial amount of adjustment takes place, and relief often turns out to be temporary.⁽³⁸¹⁾ However, the system provides little assistance to firms - or workers - that depart the troubled industries.⁽³⁸²⁾ It imposes huge costs on

consumers : if it is true that jobs are saved in this manner, the costs per production job saved are usually in the range of \$150,000 ! it would be far cheaper to openly compensate - even largely - departing workers for moving to new industries or early retirement.⁽³⁸³⁾ Finally the system engenders widespread opposition to trade liberalization.⁽³⁸⁴⁾

In the case of countervailing and antidumping duties, income transfers from consumers to producers are also very important. The problem here comes from the perversion of the law, which allows to get protection from the higher comparative advantage of competitors.

(3) The point of all this is that the classical vision of the GATT as a creator of order and predictability in international trade tells only part of the story.⁽³⁸⁵⁾ National economies are the first to suffer when their governments enter into beggar-my-neighbour policies. But governments can be forced for internal political reasons to undertake such policies. The principal function of the GATT legal system is therefore to help resolve conflicts of interest within, and not among countries.⁽³⁸⁶⁾ The function of the GATT is to allow states to defend their national economic interests not against the national economic interest of other countries, but against sectional interest within their own AND other countries.⁽³⁸⁷⁾ A similar point was made by Hudec when he wrote that "the pressures of the GATT legal system are directed toward the decision-making processes of national governments".⁽³⁸⁸⁾ The GATT-system is part of the framework of

pressures and constraints in which public choices are made.⁽³⁸⁹⁾ Although formally an international agreement among countries, GATT has therefore become functionally part of the domestic constitutional order of each contracting party.

The rise in protectionism however proves that GATT has not managed to fulfill its function. But the improvement to be made is not the one of a document like any other ; it is the improvement of a constitutional document which is needed. One has to realize that to hope for more than what GATT has achieved was to ask much too much, given its weak structures. To respond to the issues of interdependence, it would have been necessary for GATT to develop to a federal or quasi-federal state, which GATT obviously is not and towards which it could not evolve given its birth defects.⁽³⁹⁰⁾

What allows us to reach such a conclusion is that the issues raised by the "nationalization" (in the United States context) or the "internationalization" (in the European Community context) of markets over a structure of decentralized economic regulation by states have already been faced by geographically smaller economic integrations, that is, by the United States and the European Community. Two major developments have followed in both cases : (i) the rise in federal - central - power ; that is, a development of the process of norms creation at a level above the one of the states integrated into a "single" economy ; and (ii) the development of principles of nondiscrimination which respect is imposed on states when they make use of their regulatory

power. This lesson can be drawn from a study of the case law of the American Supreme Court and of the European Court of Justice whereby both supreme courts determined, by interpreting the constitution or treaty founding the union, what states can not be allowed to do if the unity of the integrated economy is to be preserved.

In order to draw an appropriate parallel with the existing institutions at the global level, one has to stress that the creation of central norms does not directly or uniquely fall within the functions of GATT. The improvement of the processes of central norm creation, which corresponds to a globalization of the fulfillment of positive state functions, is a necessary development at the global level due to the globalization of markets. However, several institutions can and probably must be involved in this process. GATT is not necessarily the best suited forum for the creation of norms. Among liberal economies, for example, the OECD plays an important role in this respect. Several codes isolated from GATT can be designed ; organizations dealing with specific on-going problems can be built, etc...

However, there is one issue area in which GATT is uniquely positioned : the prevention of protectionism by an effective implementation of the principle of nondiscrimination - in fact, what is called in GATT the MFN and National Treatment obligations - upon states. The fulfillment of this negative state function (not to discriminate) directly falls within the function of GATT.

This first Part has demonstrated that international economic integration is comparable in certain respects to international legal integration, i.e. that it is hopeless to imagine integrating national economies without developing "proto-federal" structures above the states of the economies integrated. The use of the term "federal" is rather provocative ; even within the European Community it is still considered by many to be blasphemous to pretend that the European Community is in any way like a federal state. By using the expression "proto-federal structures" however, I do not mean that the development of a fully fledged federal state is a necessity, but that certain elements of federalism have to be developed in the interest of constituents within member states.

This perspective allows us to suggest that a comparative study of the two most important federations of today - the United States and the European Community - will allow us to draw parallels and to isolate common mechanisms which both logically and politically could then be developed at the global level. This will be the purpose of the next two Parts of this book.

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PART II

THE PREVENTION OF NON-TARIFF BARRIERS IN FEDERAL SYSTEMS

(1) We have said in the first part of this book that the type of approach we propose to use to analyse the institutional developments accompanying the progressive integration of the international economy is an extension of the economic analysis of federalism.⁽¹⁾ We have mentioned that the economic analysis of federalism is a branch of the economics of the positive state which attempts to offer a unified account of political, economic and legal institutions through a theoretical reduction of each set of institutions to an aspect of this single cultural form which can be termed "liberalism".⁽²⁾ We have presented the institutions required for the existence of an international economic order by looking at the problems raised by the existence of several states in a normative perspective considering that the primary medium of socialization, at the international as well as at the national level, should be the market.⁽³⁾ Some of the institutions required at the international level to reduce or eliminate the non-tariff barriers induced by a decentralized state-system are

purely facilitative and technical.⁽⁴⁾ Others are more controversial in the sense that due to the existence of political interventions in the economy - some of which may be warranted in our liberal perspective, while some others are not - there is need for institutions preserving some stability and fairness in international micro-economic competition, which implies some sort of constraint on states' capacity to create norms.⁽⁵⁾

In highly integrated economic federations, such as the United States and the European Community, the constraints on states capacity to create non-tariff barriers to economic exchange are found in the constitution (in the United States) or in a sum of constitutional texts (in the European Community).⁽⁶⁾ This is logical since federalism, being a system of divided power, proceeds from the very essence of constitutionalism, which is limited government under the rule of law.⁽⁷⁾ In a policy organized with several layers of public authority, with possibly conflicting jurisdictions, some document (which can be termed a constitution) must define the content of the power exercised at each layer and its limits. At the global level, there is obviously no world economic constitution and the rules existing - in the GATT, with regards to trade in goods - are not usually understood as fulfilling a constitutional function. However, our thesis is that the problems to be solved are constitutional in nature, and that the global institutions aiming at preventing the creation of non-tariff barriers are a constitutional system en devenir.

(2) In the first Part, we have shown how the international system of economic institutions has developed as a reply to the intrinsic disequilibrium in representative democracies in favor of sectional organized interests, creating a need for constitutional restraints to preserve the common interest.⁽⁸⁾ We have seen that the existing system seems to have reached its limits, and is unable to adequately fulfill this function.⁽⁹⁾

Prior to present in the third Part how to improve the existing international economic regime, the present Part will indicate how non-tariff barriers are either reduced or eliminated in the two most important existing federal systems : the United States and the European Community. These two systems are central in our perspective for a variety of reasons :

(i) Their combined structural weight in the global-economy is overwhelming. This implies that if they can find a way to agree on how things should be done at the international level, they have a capacity to determine how things will be done, even if there is resistance on the part of other polities.

(ii) Combined, America and Europe have almost monopolized in the past the ideas on which the existing institutions of the liberal world-economy have been built ; it is most likely in the literature accompanying their own progressive integration and explaining it that ideas for the future will be found.

(iii) The scale of the problems they have faced, and still face, to progressively integrate is somewhat related to the scale of the problems existing at the global level.

Consequently, it is in these systems that proper experience exists from which lessons can be drawn for the world.

(iv) For the reasons mentioned above, no political action at the global level is possible if there is no agreement between America and Europe. The best way of finding where there can be agreement is to try to draw lessons from their common experience of progressive economic and political integration.

(v) Finally, even though our realist's perspective may appear somewhat imperialistic, it may be legitimated by the fact that both the American and the European polities have evidenced a tradition of preservation of liberties, political freedom, human rights, etc ... which, in an individualistic perspective such as ours, may justify that fundamental rules of behavior be structurally imposed on other states, which rights and interests do not have to be preserved as such, but only to the extent that they are useful for the preservation of the rights and interests of individuals wherever they are.

(3) A final word of caution : the internal logic of our individualistic liberal approach implies that we start our analysis by considering the institutional requirements deriving from the transborder activity of micro-economic actors. The

answer of positive public institutions is discursively presented as if it were second. In other words, our approach leads us to present institutional evolution as if the supply of norms by public institutions were occurring as a response to private demands. This logical consequence of our individualistic point of departure does not mean that in a historical sense, public institutions and norms are always developed as a reaction to private demands. It must be stressed that we don't think it is possible to demonstrate any such historical primacy. Rather, the supply and demand for rules appear in a mirror image fashion in liberal systems, and the evolution of their relationship seems to occur through a circular chain of causes and reactions.

Prior to present the manner in which the various issues raised by the political structure of federalized common markets are addressed in the United States and the European Economic Community, we will make a quick presentation of a taxonomy of such issues (§2.0.1) and of the various mechanisms created to address them (§2.0.2).

2.0.1. A Taxonomy of Issues in Federalized Common Markets

We will consider a territorial space of micro-economic exchange relationships over which various states with some capacity to create norms independently from each other, are somehow members of a "federal state". On the territory delineated by the external borders of the member states,

transactions occur in such a manner, and with such institutions, that this space and institutions are considered as composing a "common market".

By definition, federalized common markets reject both the "unitary state" and the "classical international law" approaches to constructing systems of regulation of the economic activity.⁽¹⁰⁾ The territory of these common markets is partitioned among several states so that there isn't one single state to provide the institutions and norms requested by the evolution of the transactional activity of economic actors. Simultaneously, a federal state exists with some sort of jurisdiction extending above the whole territory of the federalized common market, so that somehow "sovereignty" is shared, and member states in some instances must abide to the commands of the federal state. Federalized common markets have in principle the ability to achieve an effective balance between uniformity and diversity in the development and maintenance of institutions and mechanisms.⁽¹¹⁾ However, their structure creates special problems for the creation of an effective legal system, i.e. for the creation of a system having an effective capacity to create and implement required norms. In particular, the question is posed of how to allocate regulatory competences between the center and constituent units. Decentralized regulation being warranted for a set of various reasons already mentioned,⁽¹²⁾ while uniform regulation may be necessary in some instances, there is a tension between two poles which must be institutionally dealt

with. The allocation of power among constituent units and center varies enormously from one federal system to the other.⁽¹³⁾ Generally speaking, though :

(i) Constituent units must have substantial legal powers to regulate transactions so that decentralized political action is possible ; but at the same time, these regulatory powers must be limited so that the regulations made by constituent units do not unnecessarily impede the operation of the common market.

(ii) Simultaneously, in those areas where constituent units' powers are curbed because a lack of uniformity would put at a competitive disadvantage the micro-economic actors established on the various states' territories, or when it is necessary to prohibit states from imposing purposive barriers to economic exchange, the center must have the power and the capacity to act.

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There are thus two main problems in a federalized common market :

(i) the problem of the efficiency of a regulatory system partly decentralized to appropriately address the various issues presented. It requires that the allocation of jurisdiction over the various issue areas be made according to the intrinsic needs of the area. Local lawmaking is preferred on grounds of efficiency, participatory democracy, and diffusion of power.⁽¹⁴⁾ In many fields, there is no need for centralization of regulation :

education, for example, like transport, housing, or health, etc... is a field of regulation which is naturally decentralized.⁽¹⁵⁾ On the other hand, the management of foreign economic relations, for example, is naturally centralized to avoid competition among member states which could lead to tensions among them. Environment protection is an example of a complex field in the sense that it must both be decentralized and centralized. In particular, when decentralized political action to protect the environment is made difficult or impossible due to economic competitive pressure by non-intervening states, federal action is warranted.⁽¹⁶⁾ There is then

(ii) the problem of the non-tariff barriers induced by the existence of a decentralized system, which must be treated differently according to whether they are purposively created by states or not. In a liberal perspective, states must fulfill the needs arising in their polities which are not appropriately fulfilled by the market. The general interest is their end, and if they adopt measures for other types of purposes, the norms adopted should be challengeable. In our perspective, barriers deriving from norms adopted for valid purposes must be accepted, while norms having as sole purpose to create barriers must be rejected.⁽¹⁷⁾ Since non-protectionist non-tariff barriers may be very high and may require elimination, a differentiated treatment of non-tariff barriers must be made according to the following lines : (a) purposively and

unwarrantly created barriers need to be eliminated, and do not require any positive federal action other than prohibiting such barriers ; (b) those unpurposely created, arising out of the mere diversity in the warranted political replies to local demands, and high enough to justify giving up of the gains deriving from decentralization, require federal action ; (c) other unpurposive barriers should be accepted.

2.0.2. Mechanisms to Address the Issues

Mechanisms in federal - and federal-like - systems work to reconcile the potentially conflicting policies of (i) the free flow of trade across state lines and (ii) state interventions in markets to correct market failures and market imperfections.⁽¹⁸⁾ There are four principal mechanisms involved in resolving conflicts between open borders and diversity in the regulation of transactions : (i) federal law interventions, by the pre-emption of state law ; (ii) parallel coordination by the states themselves ; (iii) the establishment of voluntary standards ; finally, (iv) judicial intervention nullifying the effect of state laws unduly burdening the interstate flow of goods.⁽¹⁹⁾

These different means achieve different results.

The first three means consist in the adoption of central norms, through different mechanisms. The first of them is the most important one in federal systems ; We will see the use made of it in a first section (§2.1).

The last means is unique in that it merely consists in a prohibition of some types of states' actions. A main difference between judicial intervention and the three other means is that judicial intervention does not necessitate the use of the political/administrative system. Private challenges to state legislations on constitutional grounds allow the elimination of the negative effects of state laws when they are contrary to the grounds invoked. However, precisely because the judicial and not the legislative system is used here to improve the effective functioning of the economic integration, the courts can not enter into the political weighting of the different interests involved which is necessary for the elimination of many non-tariff barriers. We will see in a second section (§2.2) that courts have been struggling to find constitutional theories legitimizing their rejection of the validity of some state statutes on the grounds that they are unduly burdening the free flow of goods. Quite independently, the United States Supreme Court and the European Court of Justice have developed a similar constitutional law principle of non-discrimination.

2.1. THE ADOPTION OF CENTRAL NORMS

The adoption of central norms solves two types of problems in federalized common markets :

(i) First, it resolves the prisoner's dilemma faced by the system of decentralized policy decision-making, and which may impede decentralized state-regulation.⁽²⁰⁾ For example, in the field of consumer protection, Trubek noted that the political economy of federal systems can create de facto regulatory gaps, if the existence of a common market creates political and economic forces which deter constituent units from exercising the legal power that the federation recognizes as theirs.⁽²¹⁾ Because of the fear of losing business to other constituent units, states may be reluctant to pass stiff laws protecting consumers.⁽²²⁾ This is also true in the field of environment protection, health and safety regulation, or workers rights, etc...⁽²³⁾ The "federalization" of a field of regulation allows to overcome this difficulty.

(ii) Second, central norms allow the removal of all types of non-tariff barriers, be they purposively created by member states or not. It is important to stress that any type of non-tariff barrier can be removed in this way. If purposive non-tariff barriers can also be removed by judicial action declaring unconstitutional - or against the treaty creating the common market - the unwarranted barrier,⁽²⁴⁾ in the case of

otherwise valid decentralized measures, having protective effect but no protectionist intent, the only possibility of removal comes from the adoption of a central norm.

2.1.1. The Adoption of Central Norms in the United States

(1) In the United States, the Constitution's text establishes an intricate, three level structure for the allocation of power between the state and federal governments. (25)

(i) In one category of situations, the states are expressly and absolutely prohibited from enacting certain type of legislation. For example, the states may not "coin Money ; Emit Bills of Credit ; [or] pass any ... Law impairing the Obligations of Contracts." (26) Provisions like this place absolute constitutional prohibitions on states' power to enact these measures, and Congress alone can enact such measures.

(ii) In the second category of situations, the state must obtain congressional authorization to adopt new legislation. (27) Article I, section 10 of the Constitution provides that :

"No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws ; and the net Produce of all Impost and Duties, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States ; and all such Laws shall be subject to the Revision and Control of the Congress.
No State shall, without the Consent of the Congress, lay any Duty of Tonnage..."

In this type of situations, states can not act absent affirmative authorization by Congress, which is almost impossible to obtain given the realities of the federal legislative process.⁽²⁸⁾

(iii) In the third category of situations, the states are free to enact legislation ; however, Congress has authority to preempt or overrule such state action pursuant to its own enumerated powers. Congress' enumerated powers in article I, section 8 of the Constitution,⁽²⁹⁾ when read in conjunction of the terms of the Supremacy Clause,⁽³⁰⁾ make clear that those powers neither expressly nor conditionally denied to states may be exercised by them, subject to reversal or preemption by legislation enacted pursuant to one of Congress' enumerated powers.⁽³¹⁾

Today, it is mostly under the authority provided by the Commerce Clause - the power to "regulate commerce with foreign nations, [and] among the several states" -⁽³²⁾ that the federal government regulates "interstate commerce".⁽³³⁾ The Supremacy Clause of the Constitution making federal law supreme over conflicting state enactments, this ensures that when Congress does act, conflicting state laws are deprived of any effect.

(2) The historical roots of the Commerce Clause are to be found in the poor conditions of American commerce and the proliferating trade rivalries between the states during the Confederation's days.⁽³⁴⁾ The Commerce Clause, which was a

major innovation of the new Constitution, was a response to those concerns.⁽³⁵⁾ It had a two-fold impact : as a restraint on state action (which we will review below in §2.2.1) and as a source of national authority.

(3) As a practical matter, the US federal government of today has unlimited authority to enact measures regulating, taxing and subsidizing within the United States. The affirmation of the federal government's power to regulate virtually every aspect of the economic life of the United states is the result of a long evolution in the interpretation of the federal constitution which is beyond the scope of this book.⁽³⁶⁾ However, it is interesting for our purposes to notice that the major reason for the expansion of federal power over time was simply the transportation and communication revolutions that changed the nature of interstate commerce.⁽³⁷⁾ Prior to that, land transportation was prohibitively expensive : the cost of shipping goods thirty miles inland equated the cost of shipping them to Europe, and the nation was therefore divided into a large number of small local markets. Most commerce was contained within one of these markets, and prices in one market had little or no effect on prices in another.⁽³⁸⁾ Consequently, if one would apply the Supreme Court's modern law of interstate commerce to the economy of 1787; most commerce would still be intrastate. The modern law of inter-state commerce would have made no difference without the railroads. With the coming of railroads, local markets were linked to national markets and lost control of their destiny.

Local prosperity began to depend of far away and uncontrollable developments. When railroads and paved highways ran everywhere, the change was universal : no state or locality could manage its own economy and the Supreme Court had to decide that no commerce was beyond the reach of the Commerce Clause.⁽³⁹⁾

(4) Capitalism was given an enormous accelerating thrust by the Civil War and there is a great difference between the old constitutional environment and the one which followed the war.⁽⁴⁰⁾ While the dominant interest of the Court in the past had been the nation/state relationship, and the dominant judicial value was the preservation of the Union,⁽⁴¹⁾ the gravest problem facing America after the war was government regulation of business, and that problem became gradually the major interest of the Supreme Court.⁽⁴²⁾ From the end of the Civil War to 1937, the major interest of the Supreme Court as a molder of government policy became the relationship between government and business ; and the major value of the Court was the protection of the business community against government.⁽⁴³⁾ The grant of power to the national government made by the Commerce Clause had been uniformly interpreted broadly by pre-Civil War courts.⁽⁴⁴⁾ Negative formulas had to be designed to reduce the absolutism of the national government's power to regulate the national economy, and were in effect devised by the Court, for example in the E.C. Knight case of 1895, which forbade federal control over manufacturing on the ground that Congress may regulate only interstate commerce itself and what affects interstate commerce

"directly".⁽⁴⁵⁾ The Court held that the Sherman Act, which had been passed by Congress in 1890 to protect "trade and consumers against unlawful restraints and monopolies" could not forbid monopolies in manufacturing, because manufacturing is not part of interstate commerce, and affects interstate commerce only "indirectly".⁽⁴⁶⁾

But with the Great Depression, the trend towards increased federal powers was increased because it overwhelmed the resources of the state and local governments.⁽⁴⁷⁾ Although initially many of the statutes adopted as part of the New Deal program, which was aimed at resolving the crisis and easing the pains of the unemployed, were invalidated as unconstitutional exercises of power,⁽⁴⁸⁾ after the stunning re-election of Roosevelt in November 1936, the Court progressively admitted the federal government's power to adopt such types of economic legislation.⁽⁴⁹⁾

(5) Today, it is often claimed by scholars that the text of the United States constitution does not authorize the current balance of state and federal power, and that the actual functioning of the US Constitution is far remote from its Framers' original intent.⁽⁵⁰⁾ It is quite clear, however, that the establishment of a common market was one of the Framers' intent. In particular, the Framers wanted a stronger national union to compete more efficiently with the British.⁽⁵¹⁾ The Framers believed that British trade domination was made possible by interstate squabbling and the lack of adequate central

authority to require states to honor their obligations and agreements.⁽⁵²⁾ Accordingly, they granted power to regulate foreign commerce to the federal government.⁽⁵³⁾ It is true that the Commerce Clause limits on protectionism in interstate trade are less well supported in the Convention Report.⁽⁵⁴⁾ However, this is a logical consequence of the division of the internal market in many isolated local markets at the time. Today's interpretation of the Constitution seems consistent with the broader Framers' intent to create a viable common market.

2.1.2. The Adoption of Central Norms in The European Economic Community

(1) When the federal legislative powers in the United States are compared to those in the European Economic Community, the most striking and most important difference is that while the US congressional power to regulate interstate commerce is practically unlimited,⁽⁵⁵⁾ there is no granting of such far-reaching regulatory power to the European institutions in the Rome Treaty. In addition, even in the subject matters of regulation entrusted to the European Community, the Member States ordinarily keep a concurrent power over such subject matters to the extent that the Community has not acted upon them. As a rule, the powers granted to the European Community contain only a potential for it to exercise them, and in the absence of such exercise, the Member States remain competent to act.⁽⁵⁶⁾ Consequently, the procedural rules determining the Community's

capacity to act are important for an effective Community action. In this respect, the Council of Ministers powers for the approximation of national laws are fairly strictly bound by Article 100, which is the Article which has been mostly used for the removal of non-tariff barriers resulting from disparities in national regulations.⁽⁵⁷⁾ Article 100 provides that :

The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market."

Article 100 therefore requires that the Council, which comprises one representative for each Member State, shall act by unanimous vote to approximate national provisions directly affecting the establishment or functioning of the common market, and the unanimity requirement has made such approximation difficult in the past.

When federal laws in the United States are compared with the legal instruments available in the European Community, it appears that the legislative process in the EC is rather more inhibited.⁽⁵⁸⁾ The principal species of instruments by which the Council and Commission may legislate in pursuance of the Rome Treaty are set out in Article 189.⁽⁵⁹⁾ The instrument directly comparable with federal law is the "regulation", which is directly applicable throughout the European Community. However, since its use is required by article 100, the more widely used instrument to remove non-tariff barriers has been the directive, which provides only an indirect and unsatisfactory means for

enacting uniform provisions throughout the European Community. A directive does not as such create rules of law directly applicable in Member States, but only requires Member States to adapt their legislation to conform it with the directive.⁽⁶⁰⁾ Because of its legal nature, a directive may create difficulties for the incorporation of community rules in the legal orders of member states.⁽⁶¹⁾

(2) Thus, until the Single Act, article 100 was presenting two limitations for the elimination of non-tariff barriers : the Council was to act unanimously and, when acting, was only adopting directives. Article 8A of the Single Act has introduced a new policy objective into the Rome Treaty, stipulating that the Community must adopt measures with the aim of progressively establishing the internal market by December 1992.⁽⁶²⁾ Article 100A, which goes hand-in-hand with Article 8A,⁽⁶³⁾ provides in substance that for the adoption of measures "which have as their object the establishment and functioning of the internal market", majority voting in the council replaces unanimity. Therefore, one of the main obstacles to the improvement of the European common market has been removed and should allow the adoption of the some 292 instruments that the Commission proposed in its "White Paper" as a means to reduce the non-tariff barriers impeding the internal market.

As far as the other limitations of directives as a means of achieving an effective quasi-federal system of regulation is concerned - their lack of direct applicability - it has been partly removed by Article 100A which allows - still for the

achievement of the internal market - the adoption either of directives or regulations. This extension of the range of instruments allowed is a reaction to past experience with directives.⁽⁶⁴⁾ However, in its declaration on Article 100A, the Commission has given assurance that it would give preference to the use of directives if harmonization involves the amendment of legislative provisions in one or more Member States.⁽⁶⁵⁾

In addition to provide for a system of creation of central norms, federal systems provide for another method to reconcile the potentially conflicting policies of the free flow of goods and of states' interventions in the economy, by allowing judicial intervention to nullify the effects of state laws unduly burdening the free flow of goods. We will see in the next section what theories have been developed by the United States Supreme Court and by the European Court of Justice in their case law to legitimate their apparent interferences with the people's representatives decisions.

2.2. THE PREVENTION OF STATE PROTECTIONISM

We will first review the prevention of state protectionism in the United States (§2.2.1) and then in the European Economic Community (§2.2.2).

2.2.1. The Prevention of State Protectionism in the United States

(1) We have already mentioned that the US Congress, as a practical matter, has unlimited authority to enact measures regulating, taxing or subsidizing within the United States.⁽⁶⁶⁾ In addition to this positive competence, in case Congress does not regulate some aspect of commerce, the federal courts have exercised authority - generally held to derive from the Commerce Clause -⁽⁶⁷⁾ to invalidate state measures that "unduly" burden or restrict such commerce.⁽⁶⁸⁾ Thus, since early in the nineteenth century, the Supreme Court has promoted economic union on the basis of the "Dormant Commerce Clause" doctrine by invalidating state laws that were hostile to a national common market.⁽⁶⁹⁾ The reason for this intervention of federal courts in states' regulations of interstate commerce - without a clear textual basis - is simply that the most important argument for constitutional limitations on state power is a systemic, structural one.⁽⁷⁰⁾ Their position derives from their belief

that economic union is a central purpose of the Constitution, and that the judiciary has broad powers to carry out that purpose.⁽⁷¹⁾

(2) The Dormant Commerce Clause doctrine has no direct support in the text of the Constitution.⁽⁷²⁾ If specific provisions forbid state duties on foreign imports and exports⁽⁷³⁾ and on shipping,⁽⁷⁴⁾ and state discriminations against citizens of other states,⁽⁷⁵⁾ the words of the Commerce Clause grant regulatory power to Congress and do not explicitly limit the states when Congress has not acted.⁽⁷⁶⁾ However, the Constitution, viewed as a coherent document, embodies a concept of economic nationhood, of a "common market" that is inconsistent with certain forms of parochial legislation.⁽⁷⁷⁾ This common market is composed of several "sovereign" states, able to exercise their authority through the adoption of economic regulations. There is, however, no explicit provision in the United States Constitution directly limiting the power of states to regulate interstate commerce.⁽⁷⁸⁾ Thus, even though much local economic regulation has non-local consequences there is no general prohibition on economic regulation by the states ;⁽⁷⁹⁾ however, because there is common market, the Supreme Court has ensured that states do not adopt measures that "unduly" burden interstate commerce. The importance of such a review has been clearly stated by Justice Holmes :

"I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration

as to the laws of the several states. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end." (80)

As the final arbiter of the conformity of state legislation to the federal Constitution, the Supreme Court has had the responsibility for working out the negative implications of the Commerce Clause, developing a case law around its "Dormant Commerce Clause" doctrine. (81) It has been clear very early that the national interest in maintaining a common market can not be construed as meaning that there is an absolute prohibition of state legislation impinging upon interstate commerce. (82) That would really make nonsense of the whole idea of federalism. (83) Indeed, the case law affirming the validity of state legislations affecting or regulating interstate commerce, when passed out of a legitimate concern for the well being of its people, is substantial. (84) The difficulty lies in the delimitation of the appropriate test to screen states' measures in order to distinguish among those which, even though they affect interstate commerce, are valid, and those which are not.

(3) In order to strike an adequate balance between the interests of state and nation, the Court had to formulate legal theories working out the negative implications of the Commerce Clause. (85) Several formulations have been used over the years. (86)

Prior to review these various formulations, it must be stressed that if burden on commerce alone were sufficient to invalidate a measure, few state taxes or regulations would

survive :⁽⁸⁷⁾ Some state laws, such as those defining basic property rights of ownership and alienability, promote rather than burden commerce ;⁽⁸⁸⁾ many other laws are commerce neutral, except as part of a state's package of laws competing against the package of other states ;⁽⁸⁹⁾ but most taxes and commercial regulations displace or restrict market allocation and thus "burden" commerce.⁽⁹⁰⁾

Even though the doctrine applied by the Court is not too obvious, and even though there is a lively debate in the United states as to what that doctrine actually is, it appears today that what the Court is after in its review of states' measures is to see whether an allegedly legitimate state interest to impose restrictions on interstate commerce is really just a pretext for some type of discrimination against out-of-state business.⁽⁹¹⁾ We will first review the various theories used over time by the Supreme Court (§2.2.1.1) and then what are the rationales for the non-discrimination principle now enforced by the Court (§2.2.1.2).

2.2.1.1. Judicial Theories of the Dormant Commerce Clause

The first approach used by federal courts was to focus on the nature of the powers being exercised. In 1824, Marshall denied, in Gibbons v. Ogden,⁽⁹²⁾ the rights of the states to regulate interstate commerce as such. He acknowledged the right of states to enact "inspection, quarantine laws, [and] health laws" despite their "remote and considerable effect on commerce", but on the basis of the "police powers" of the states under the Tenth Amendment. However, the line between the commerce and police powers soon got very murky.⁽⁹³⁾

Therefore, in Cooley v. Board of Wardens,⁽⁹⁴⁾ a second approach was used, shifting the emphasis from the nature of the power exercised to the subject regulated. In 1851, Cooley established the general rule that states may freely regulate those subjects of commerce that are "local" but not those which in their nature require national uniform legislation.⁽⁹⁵⁾ However, the Court did not develop an adequate standard to determine which subjects are "local" and which are "national". Declaration had substituted judicial analysis and the Cooley rule suffered from the same defect as the police power doctrine in Gibbons.⁽⁹⁶⁾

A third formula was developed after Cooley : the "direct/indirect" burden test.⁽⁹⁷⁾ Regulations burdening interstate commerce "directly" were held invalid ; those burdening it "indirectly", "incidentally" were held valid. Evidently, this led to a rhetoric frequently undistinguishable from police-power analysis, using "labels to describe a result rather than any trustworthy formula by which it is reached."⁽⁹⁸⁾

In the modern era, the Court has been shifting its analysis to put the emphasis not so much on what is regulated, but on how it is regulated.⁽⁹⁹⁾ In this fourth approach, the Court appears to be balancing interests, which makes some writers critical of this doctrine, as it is reminiscent of due process analysis.⁽¹⁰⁰⁾ Part of the American doctrine in effect claims that to determine the constitutional validity of a state regulation having effects on interstate commerce, a "balancing test" is to be applied. This doctrine realizes that to say that

the appropriate standard is a balancing test says very little about the pattern of results that will be generated by applying the standard.⁽¹⁰¹⁾ With a balancing test, everything turns on what factors are placed on the scales, how they are characterized for purposes of evaluation, and how they are weighted and ordered in the analysis.⁽¹⁰²⁾ In fact, several different kinds of "balancing tests" have been advocated.⁽¹⁰³⁾

(a) One is the so-called "open-ended private interest balancing".⁽¹⁰⁴⁾ Under various theories, it is argued that any cost imposed by a statute on a private party can be advanced as an argument against the constitutionality of the statute. According to this test, all costs to a private party should deserve some weight in the balance. They all give rise to a need for legislative justification, which is said to be up to the courts to see is present.⁽¹⁰⁵⁾ However, since 1937 and the discredit on "substantive due process" doctrines, if it is considered that those arguments are fully met for legislative consideration, they also are considered as being constitutionally irrelevant.⁽¹⁰⁶⁾

(b) The most serious candidate as a test in movement-of-goods cases under the Dormant Commerce Clause is "protectionist effect balancing".⁽¹⁰⁷⁾ The basic idea is that if a statute has a protectionist effect - improving the competitive position of some local economic actors vis-à-vis their foreign competitors - the Court must look to see whether it has also good effects adequate to justify the negative protectionist effect. This test seems to be the Court's currently favored official test. Hence, in Pike v. Bruce church, Inc.,⁽¹⁰⁸⁾ Stewart wrote :

"Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." (109)

The Court seems to be balancing interests : if a Legitimate Local Public Interest ("LLPI") leads to the adoption of a state norm having Putative Local Benefits ("PLB"), but also an Effect on Interstate Commerce ("EIC") imposing a Burden on Interstate Commerce ("BIC"), the state norm will be upheld if $BIC < PLB$. However, Professor Regan's discussion of the Court's practice in the modern era demonstrates that despite the Court's talk about balancing, the Court has been doing nothing more in this area than implementing the anti-discrimination principle. (110)

Protectionist effect balancing is simply a means of smoking-out protectionist purpose. It is protectionist purpose which is objectionable, and protectionist effect is only important as evidence of protectionist purpose. (111) That it is protectionist purpose which makes a regulation criticizable in an economic integration is demonstrated by Professor Regan, in the following manner.

To effectively implement the anti-protectionism principle which is at the root of a multi-state common market, we want to prohibit the laws other than the classical tariff, embargo and quota which fall under the same condemnation. (112) To recognize these, we have to identify the features of classical protectionist measures. Regan writes :

"The classical tariff or embargo or quota joins three features : (1) It is explicit ; that is, it legislates explicitly in terms of state line. (2) It is motivated by protectionist purpose ; its object is to improve the competitive position of local economic actors, just because they are local, vis-à-vis their foreign competitors. (3) It produces a protectionist effect ; it diverts some business from foreign economic actors to their local competitors.

Can we identify one of these three features of classical protectionist measures as central ? Yes, we can. If we consider in turn our three objections to protectionism - the concept-of-union objection, the resentment/retaliation objection, and the efficiency objection - we [can] see that in connection with each of these objections the centrally relevant feature is protectionist purpose." (113)

Because of the importance of the efficiency objection to state protectionism for our purposes, it is the only objection with regard to which we will study in more detail the adequacy of a motive review to screen protectionism. (114)

Efficiency is a treacherous notion. Hence, a regulation can have for result to divert business from low-cost to high-cost producers and be efficient - in situations where it internalizes some cost not taken into account by the market under the previous scheme. The problem of such a regulation in a multi-state economy is that the diversion commonly ends up being in the benefit of local producers. It is therefore apparently protectionist, diverting business from out-of-state competitors to local ones. But with our understanding of efficiency, protectionist effect in itself does not trigger the efficiency objection. (115)

Within the US constitutional system, the proper formulation of the inefficiency argument is the following : protectionism is inefficient because it diverts away business from presumptively low-cost producers without any colorable justification in terms of a benefit that deserves approval from the point of view of the nation as a whole ;⁽¹¹⁶⁾ without any colorable justification in terms of a "federally cognizable interest".⁽¹¹⁷⁾

"If a law which diverts business from foreign producers to local producers is motivated by protectionist purpose, it aims only at transferring welfare from foreigners to their local counterpart. That is not a federally cognizable benefit. On the other hand, if the law is not motivated by protectionist purpose, it must have some other purpose. That other purpose, whatever it is, will provide a colorable justification in terms of a federally cognizable benefit, since anything else the state aims at by way of economic regulation must be counted a benefit from the national point of view for constitutional law purposes."⁽¹¹⁸⁾

Take for example the Oregon bottle law.⁽¹¹⁹⁾ In 1971, Oregon enacted a statute designed to protect the environment by discouraging the use of non-returnable, non-reusable beverage containers. The statute prohibited "pull-top" metal cans, and imposed a specified refundable deposit on beverage containers, repayable by retailers to consumers and by distributors to retailers upon return of the container. The object of the statute was to discourage a mode of production - the packaging of beverages in non-returnable and non-reusable cans - that created costs (in the form of litter) not accounted for by market mechanisms. In other words, the object of the law was to improve productive efficiency by correcting an inefficiency that resulted from an external cost of the existing productive process.⁽¹²⁰⁾

Oregon attempted to correct the inefficiency partly by requiring internalization (the provisions about mandatory refunds for returned cans) and partly by prohibiting outright certain specially obnoxious modes of production (packaging in pull-top cans). In sum, even though the Oregon bottle law diverted some business from foreign producers to local ones, there is no reason to condemn the law as inefficient. Hence, if costs are evaluated by the scheme implicit in the legal status quo prevailing before the bottle law, packaging beer in lightweight non-returnable metal cans outside Oregon (for the most part) and shipping it into Oregon is the low-cost method of distributing beer in Oregon. But that scheme does not take into account the cost of litter. The Oregon legislature decided that the cost of litter was significant and should be assigned to the modes of production that caused it. Then, it might well be that filling glass bottles within Oregon (to a greater extent than before) is the low-cost method of packaging under the new cost assignment scheme. So, just as the Oregon law diverts business from low-cost producers under the old scheme, it diverts business from high-cost producers to low-cost producers under the new scheme. What happened in between is a legitimate political decision that litter is a significant cost which should be internalized into the production process, legitimate in the sense that it deserves approval from the point of view of the nation as a whole, and not only from the point of view of Oregon.

The notion of "federally cognizable benefit" which legitimates the diversion of business from presumptively low-cost producers is difficult to grasp. Within the United states, it is clear that a classical tariff or quota enacted by a state to apply on interstate commerce would aim at no federally cognizable benefit, no benefit that deserves approval from the point of view of the nation as a whole.⁽¹²¹⁾ Simultaneously, the adoption by states of policies, implemented in an evenhanded manner, is a federally cognizable benefit because the constitution is written in such a manner that states have the autonomy to decide what laws to adopt. This doesn't mean that there is need of a national policy - for example against consumption pollution in the form of litter - before it is possible to say that a state regulation against such a pollution seeks a federally cognizable benefit.⁽¹²²⁾ The whole point about federalism⁽¹²³⁾ is to have states as independent entities making their own decisions about - for example - what sort of an environment they value and want to maintain.⁽¹²⁴⁾

Laws like the Oregon bottle law may have a protectionist effect by the mere fact that they add to the diversity of the regulation of commerce. However, there is no national interest in uniformity in commercial regulation, which would prevent states from adopting tough environmental laws,⁽¹²⁵⁾ and suggesting that there is such an interest - especially in view of the breadth of "commercial regulation" nowadays - is very nearly to make nonsense of the whole idea of federal union. Congress may, under the Commerce Clause, limit state power to enact legislation

that is thought to interfere unduly with an integrated national economy, even though it is valid under the anti-protectionism principle. But the role of the Court is only to see that in adopting legislation, states do not act with a discriminatory intent.

2.2.1.2. Rationales for the Anti-Protectionism Principle

(1) There is first a semiotics rationale to the anti-protectionism principle : the commands of the Constitution are principally addressed to legislatures, and the business of courts reviewing the constitutionality of legislation is to see that legislatures do their duty.⁽¹²⁶⁾ It follows that the Court's standards for reviewing legislation ought to originate in prescriptions for legislative behaviour that it is reasonable to expect legislatures to comply with.⁽¹²⁷⁾ And precisely, the requirement of avoiding protectionist purpose is such a prescription, whereas judicial balancing of a law's benefits against its protectionist effect does not reflect a proper underlying prescription for legislative behavior.⁽¹²⁸⁾ Legislatures need not balance BICs and PLBs, and the Court should not adopt a mode of review that suggests the legislature should have balanced.⁽¹²⁹⁾ Now, there is no doubt that it is difficult for a multi-member body such as a parliament to be always sure what its purposes are.⁽¹³⁰⁾ It is even more so in the case of a legislature which is arbitrating the different interests represented. But it is still appropriate to instruct a

legislative body to take care for its purposes, and to ensure that protectionist purpose does not contribute substantially to the adoption of the law or any of its features.⁽¹³¹⁾

(2) In addition to this first rationale, the Court is ensuring the efficiency of local lawmaking by enforcing the anti-protectionism principle, which is a basic justification for state autonomy in a federal system.⁽¹³²⁾ Local lawmaking can be more exactly tailored to particular problems and can more readily experiment with different solutions, competition among legal systems generating efficiencies as jurisdictions compete to attract and retain people and capital.⁽¹³³⁾ Local lawmaking best serves these ends when people and resources are mobile and when local laws do not export significant costs. When government imposed costs borne at home become relatively large, a state's product are less competitive than products of states imposing lower costs ; Local politics then restrains the legislature. When the same costs are largely exported, political restraint weakens or disappears.⁽¹³⁴⁾

To the extent that the dormant commerce power doctrine invalidates only cost exporting legislation, it defers to efficient local lawmaking and complements competition among legal systems.

2.2.2. The Prevention of State Protectionism in the European Economic Community

If the US Supreme Court views the Commerce Clause not just as a source of Congressional power to regulate interstate commerce, but also as a restraint on states' power to affect such commerce, the Treaty of Rome articles on free movement of goods serve as the source of a corresponding restraint on Member States actions affecting movement of goods within the Community.⁽¹³⁵⁾

It has been suggested that in reviewing the compatibility of state action with these "constitutional" restraints, the European Court of Justice is less tolerant of state restrictions than the Supreme Court.⁽¹³⁶⁾ It is recognized that both courts manifest a common attitude against legislations that openly discriminate against goods from other states by imposing restrictions that are not equally applicable to domestic goods. Except in rare circumstances, these legislations are held to be invalid.⁽¹³⁷⁾ It is in the cases that deal with pieces of legislation that do not on their face reveal a protectionist aim that courts are said to differ. When legislation does not openly express a protectionist policy, but nevertheless restricts the free movement of goods across state boundaries, it is said that the Court of Justice has held such legislation generally incompatible with the Treaty, while the Supreme Court has held that if the legislation resists a "balancing test", it is not proscribed by the Constitution.⁽¹³⁸⁾

However, we have seen in the previous section that the Supreme Court is interested in screening protectionist purpose, which is quite different from protectionist effect balancing.⁽¹³⁹⁾ It takes account of protectionist effect only as evidence of protectionist intent.

We will see now that the European Court of Justice holds invalid - if not saved by Article 36 of the Treaty of Rome -⁽¹⁴⁰⁾ only some of the legislations that restrain the free movement of goods without being openly protectionist. For some years, the Court appeared to be going beyond merely suppressing protectionism in its decisions about what economic regulations by Member States were forbidden by the Treaty of Rome.⁽¹⁴¹⁾ But it is clearer now that what the Court is after is - like the American Supreme Court - protectionist intent.

2.2.2.1. Anti-Protectionism in the Treaty

The validity of the type of structural argument used by Professor Regan to delineate what principles are to be used to prevent state protectionism in movement-of-goods cases is confirmed in the European context by the position of Articles 30-36 - which are the ones designed to prevent such protectionism - within the Rome Treaty. In part II of the Treaty - dealing with the Foundations of the Community - Title I is the one on free movement of goods. It was logical that it should contain two chapters, each dealing with closely related provisions designed to ensure the free movement of goods within the Common

Market :⁽¹⁴²⁾ Chapter I deals with the Customs Union,⁽¹⁴³⁾ and from the beginning, the Court has taken a firm position against charges having equivalent effect to customs duties ;⁽¹⁴⁴⁾ Chapter II (Articles 30-37) deals with the elimination of quantitative restrictions between Member States. Prohibiting tariffs is clearly not enough to create a common market if at the same time quantitative restrictions and equivalent measures are not restricted.⁽¹⁴⁵⁾ Article 30 contains a general prohibition in trade between Member States of restrictions on imports and of all measures having an "equivalent effect". Article 34 prohibits quantitative restrictions on exports and equivalent measures. Article 36, however, allows certain important derogations from the rules of free movement - apparently creating a risk of circumvention of the principles of the Treaty - in favor of some important non-economic interests.⁽¹⁴⁶⁾

2.2.2.2. What is "Equivalent"?

So much for the text. Now, if it is clear what a quantitative restriction is, what is an equivalent measure to a quantitative restriction ? In the case Procureur du Roi v. Dassonville, the Court wrote obiter dictum :

"All trading rules enacted by Member States which are capable of burdening, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."⁽¹⁴⁷⁾

In short, virtually every kind of measure can have the effect of hindering intra-Community trade and therefore can be considered as a measure having an equivalent effect to quantitative restrictions. Does that imply that they are prohibited by the Rome Treaty, as seems then logical ?⁽¹⁴⁸⁾ No. The Court gave a wide interpretation of what are "measures having an equivalent effect to quantitative restrictions" in order to keep the ambit of Article 30 as wide as possible. This was necessary because the Court wanted to be in a position to check protectionist motives in all the pieces of legislation susceptible of hiding such discrimination, i.e. in everything.⁽¹⁴⁹⁾

Discrimination - as we are well aware now - can come under two forms. It may be embodied in national rules that expressly distinguish between intra-community trade and domestic trade, and which put the former at a disadvantage. These measures have usually been held inadmissible measures of equivalent effect - when not saved by Article 36.⁽¹⁵⁰⁾ Discrimination may also occur when national rules by their terms apply equally to all goods originating in the Community or in free circulation, but the effect of those rules in practice is to put goods imported from, or exported to, other Member States in a less favorable position than similar goods produced at home. Now, the fact that there is negative effect on intra-Community trade is important : it is what is pursued by the protectionist state and it is strong, even though non-conclusive, evidence of protectionist intent. But effect is important as evidence of intent, and that's all.

What the Court is really after in its review is discrimination.⁽¹⁵¹⁾ However, neither Article 30 nor Article 34 mentions discrimination, in contrast to Article 36, which makes the absence of arbitrary discrimination an essential condition to be satisfied before there can be any defense under this Article. This might lead to the conclusion that discrimination is not an essential part of the offense, but that its absence is a required element of each of the special defenses in Article 36.⁽¹⁵²⁾

A distinction has to be made in the analysis between discrimination and Article 34 of the Rome Treaty, where there is general agreement that the Court applies a discrimination test, and discrimination and Article 30 of that same Treaty, where there is some discussion as to what the Court is doing.

2.2.2.3. Discrimination and Article 34 of the Rome Treaty

It is clear that what the Court is after in Article 34 cases is discrimination. It is settled law that in Article 34 cases, the Court - in accordance to what it does in Article 30 cases as we will show below -⁽¹⁵³⁾ has adopted a criterion of discrimination when considering measures applicable without distinction as to the destination of the product concerned.

This was made clear by the Groenveld case.⁽¹⁵⁴⁾ It involved a Dutch regulation prohibiting the use of horsemeat in the manufacture of sausage. The measure, indistinctly applicable, had nevertheless been taken in order to facilitate the export of sausages to anglo-saxon countries, psychologically hostile to the idea of eating horsemeat.

The Court clearly made discrimination the criterion for its judgment and decided that the Dutch measure, applied objectively without drawing a distinction depending on whether the goods are intended for the national market or for export⁽¹⁵⁵⁾ did not provide a "particular advantage" for national production "at the expense" of other Member States.⁽¹⁵⁶⁾

The Court expressly specified that its appreciation was

"... not affected by the circumstances that the regulation in question [had] as its objective, inter alia the safeguarding of the reputation of the national production of meat products in certain export markets in the Community and in non-member countries where there are obstacles of a psychological or legislative nature to the consumption of horsemeat."⁽¹⁵⁷⁾

The intent of the Dutch legislator was not to hinder the free movement of goods : it was to encourage it. There was no protectionist intent behind the legislation ; on the contrary, it was motivated by a desire to avoid a potential restriction on trade due to the impossibility for the consumer to determine whether horsemeat is present in sausages or not.⁽¹⁵⁸⁾

2.2.2.4. Discrimination and Article 30 of the Rome Treaty

The Court of Justice also applies a discrimination test in Article 30 cases, even though part of the doctrine claims the contrary.⁽¹⁵⁹⁾ This doctrine - which acknowledges the use of the discrimination principle in Article 34 cases - then regrets that the Court does not have a single concept of what constitutes

measures having an effect equivalent to quantitative restrictions.⁽¹⁶⁰⁾ The Court indeed has a single concept of measures of equivalent effect :⁽¹⁶¹⁾ these are the measures adopted with a protectionist intent.⁽¹⁶²⁾

The doctrine pretending that the Court cares about effect on trade in Article 30 cases takes the Dassonville⁽¹⁶³⁾ case as expressing the test when it says : "all trading rules... which are capable of burdening... intra-Community trade are to be considered as measures having an equivalent effect."⁽¹⁶⁴⁾ But by this sentence, the Court is not expressing its test : it is keeping open the possibility to check bad motive in all kinds of texts. The Court does not prohibit all these measures "having an equivalent effect". The European integration is not intended to create total integration : the Court recognizes that if interests or values deserving protection are not protected by Community law, then it is up to states to protect them.⁽¹⁶⁵⁾ However, then, the measures taken are necessarily within the ambit of Article 30, necessarily having "effects" outside the state adopting them, and the Court must have the possibility to check whether the measure was adopted for valid purposes or not.⁽¹⁶⁶⁾

The role of discrimination is better seen in the case Commission v. Ireland.⁽¹⁶⁷⁾ In that case, certain souvenir jewellery had to be marked "foreign" when imported into Ireland. The Irish government said this was justified in the interest of consumer protection and the fairness of commercial transactions. The Court held however that the Irish measures could not be

regarded as outside the scope of Article 30. This was because they were discriminatory, and discrimination prevents any reliance on these grounds. (168)

Bad motive, protectionist intent, discrimination is therefore as much the test in Article 30 as it is in Article 34. (169)

2.2.2.5. Discrimination and Article 36 of the Rome Treaty and the "Cassis de Dijon" Doctrine

(1) The non-discrimination principle applies also when states attempt to defend restrictive measures taken under the authority of Article 36, allowing certain "exceptions" to the rules on free movement. Additionally, the principle equally applies for measures benefiting from the "Cassis de Dijon" jurisprudence. Due to the very wide definition of measures of equivalent effect to quantitative restrictions which the Court gave in Dassonville, it is not surprising that the Court should sooner or later accept the need to restrict the effect of that definition in some way. (170) The method chosen in "Cassis de Dijon" was to declare that there were certain "exceptions" to the rule in Article 30, in addition to those created by Article 36.

In fact, these so-called "exceptions" are exceptions to the rule in Article 30 only if one considers Article 30 to aim at preventing measures having a negative effect on trade. With this perspective, the role of Article 36 is to recognize exceptions in favor of some non-economic interests. The problem with this approach is that because the favored non-economic interests are limitatively enumerated, one wonders then how the Court could create additional "exceptions" to the ones provided by Article 36.

In fact, neither Article 36 nor the "Cassis de Dijon" jurisprudence are "exceptions" to the rules on free movement, understood as rules designed to prevent negative effects on intra-community trade. There are no such rules and Article 36 and the "Cassis de Dijon" jurisprudence are a sub-part of the non-discrimination principle which is the only rule pursuant to which measures equivalent to a quantitative restriction are prohibited in European Community law.

Article 36 and the "Cassis de Dijon" jurisprudence form a coherent whole : the Treaty provides only for limited instances (in Article 36) in which state-regulation can have a negative effect on intra-Community trade without being presumptively protectionist ? Very well ; the Court, because it is after protectionism only, can - like the Treaty did in Article 36 - identify for itself those fields in which state regulation is not protectionist - whatever its effects - if it passes a "proportionality test" between its avowed goal and the means used. If the Treaty cared about effect, nothing would excuse the extension of the list of non-economic interests protected by Article 36 which has been made by the Court by "Cassis de Dijon" and subsequent case law ; but the Treaty in fact cares only about state protectionism, and the Court did just what it was supposed to do, i.e. check that when states do regulate when they should, they do it in a non-discriminatory manner.

(2) Before reviewing the exception mechanism to Article 30 created by the Court, let us first review the exception mechanism existing in the Treaty in Article 36. This Article reads :

"The provisions of Article 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security ; the protection of health and life of humans, animals or plants ; the protection of national treasures possessing artistic, historic and archaeological value ; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

One could think of reading the two sentences in Article 36 independently.

The first sentence then in essence would say that "prohibitions or restrictions" are not prohibited if they are justified on certain grounds. These grounds are important non-economic interests that arguably the authors of the Treaty didn't want to see destroyed by unrestrained market mechanisms. So far so good.

But then, what does it mean for "prohibitions or restrictions" to be "justified" ? Does that mean that for "prohibitions and restrictions" to be admissible, a state only has to say that they are adopted to protect one or more of the mentioned possible grounds, and that this automatically "justifies" them ? Could that suffice for "prohibitions and restrictions" to be "justified" ? Obviously no : it would then be much too easy to go around the prohibition of adopting measures having an equivalent effect to quantitative restrictions.

The second possible interpretation of what "justified" means would be that the Court will review the state policy to verify its adequacy to its avowed goals. But then, what theory is it going to use ? The specter of what is called "substantive due process" in the United States is not far away.

However, the theory the Court is to apply is written in Article 36 itself. The second sentence of the Article doesn't mean that "in case there would be discrimination, it shall not be arbitrary." The sentence has to be read together with the first one. It makes sense, then, while giving its exact meaning to the first sentence.

What the article says is that in order to protect important non-economic interests, we admit discriminations. That's what "prohibitions or restrictions on imports, exports or goods in transit" are : discriminations. We do not preclude them for the reason that they can happen to be necessary for the protection of the interests mentioned.⁽¹⁷¹⁾ What is it that says that what we want to allow is only necessary "prohibitions or restrictions" ? Article 36, second sentence : "such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination...". A necessary "prohibition or restriction " is by definition not arbitrary ; by prohibiting arbitrary "prohibition or restrictions", we keep only the ones we accept : the necessary ones.

Thus, if genuinely based on one of the grounds mentioned in Article 36, a national measure may discriminate against imports, or exports, or goods in transit, but may not do so in an

arbitrary way. The distinction between good discrimination and bad - arbitrary - discrimination is best seen in the case Rewe-Zentralfinanz v. Landwirtschaftskammer.⁽¹⁷²⁾ It was decided that although domestic products and imported ones were treated differently in this inspection law, there was no arbitrary discrimination because effective domestic measures were taken to prevent the distribution of contaminated domestic products, and that experience had shown that there was a risk of spread of the disease if imported products were not inspected.

Another expression of the non-arbitrary discrimination principle is that measures falling within the exceptions of Article 36 also have to meet a "proportionality test". Measures will not be justified under Article 36 if the objective could be obtained by other measures which could be less restrictive of intra-Community trade and which a member state could reasonably be expected to take. But this is no "balancing test" : the rationale for the proportionality test is that a discrepancy between goal and means is evidence of a discriminatory intent.⁽¹⁷³⁾

Article 36 is therefore an exceptional device in two respects : First, States can use it only if there is no Community action ; Second, it allows discriminations only in a limited number of enumerated fields. This second aspect has brought the Court to interpret strictly the grounds mentioned in the Article which means that states cannot invoke Article 36 to protect other interests than the ones mentioned in the Article.⁽¹⁷⁴⁾

(3) However, with the wide definition of measures equivalent to quantitative restrictions which the Court gave in Dassonville, in order to allow the widest possible judicial review combined with its strict reading of the "exceptions" contained in Article 36, the Court had to restrict the effect of Dassonville in some way, recognizing that effect on trade is not what it was after. Announcing that it could review all measures of states because they all can be the locus of hidden protectionism was necessary in order to protect the spirit of the Common Market. However, the Court had to find a way to allow protectionist effects - even in the cases not accounted for in Article 36 - in the cases where a protectionist effect was a necessary consequence of an acceptable state policy.

The method chosen was to declare that there are certain "exceptions"⁽¹⁷⁵⁾ to the rule in Article 30, in addition to those created by Article 36. Obviously, they can be found in no specific Article of the Treaty since the draftsmen of the Rome Treaty concentrated all the exceptions to Article 30 they thought about at the time of drafting in Article 36. But these additional "exceptions" logically derive from the structure of this text, for the same reason that many state economic regulations are constitutionally valid in the United States even though they impede on interstate commerce.

In the "Cassis de Dijon" case, a French liqueur was prevented from being marketed in Germany because its wine spirit content was too low. The plaintiff attacked this under Article 30 of the

Rome treaty, and the Germans sought to justify their law because it was needed on three grounds - for the protection of public health, the protection of the consumer against fraud, and the suppression of unfair competition. Advocate General Capotorti regarded the facts as falling prima facie within the scope of Article 30, and thought that the only possible escape way through Article 36 did not apply in view of the particular facts.

The Court did not analyse the situation in the same way, and nowhere in its judgment did it mention Article 36... It recognized that in the absence of common rules on the production and marketing of alcohol, it would be for the Member States to regulate those matters on their own territories.⁽¹⁷⁶⁾ Thus, if the Community does not act in a field, states can - and this is so because there are, in the words of the Court, "mandatory requirements" relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer. States satisfy the requirements mentioned or they don't. However, if they do, they will do it independently, autonomously, and most likely differently one from another. Then, surely, the "disparities between the national laws" will create "obstacles to movement within the Community". Article 30 should then apply - one could think and some would say - except if these obstacles are saved by Article 36. But no : these obstacles "must be accepted".⁽¹⁷⁷⁾ And why must they be accepted ? Well, precisely for the reason that states can act if the Community doesn't : states are sovereign, and if they are not bound to inaction by some valid international norm, they can adopt whatever measure pleases them to satisfy so-called "mandatory requirements".⁽¹⁷⁸⁾

However, the Court kept for itself the possibility to verify that two kinds of requirements are met : First, as to what "mandatory requirements" are. The Court gave only examples ("in particular"), keeping the possibility to extend the list,⁽¹⁷⁹⁾ but also to refuse such expansion to a particular "requirement" which could come to be invoked by a state to defend its legislation.

But second, states can act and in effect create barriers only as long as they live up to their obligations under the Treaty, that is, as long as they do not discriminate. The "obstacles... must be accepted... insofar as those provisions may be recognized as being necessary". We arrive back at the already mentioned problem of the determination of what is necessary, and at the conclusion that the so-called "proportionality test" is in fact only a test to determine and screen protectionist purpose.⁽¹⁸⁰⁾

(3) Article 36 and the "exceptions" to Article 30 constitute a coherent body of law allowing to check states intent.⁽¹⁸¹⁾ There remains a difference between the two escape possibilities : under Article 36, it is possible to discriminate openly, and it seems not to be the case with the exceptions to Article 30.

Thus, in Commission v. Ireland,⁽¹⁸²⁾ the Court recalled its previous position in several cases⁽¹⁸³⁾ that

"... it is only where national rules, which apply without discrimination to both domestic and imported products, may be justified as being necessary in order to satisfy imperative requirements (...) that they may constitute an exception to the requirements arising under Article 30."⁽¹⁸⁴⁾

The Court - not asking for the absence of arbitrary discrimination - seems to require a text non-discriminatory on its face to be susceptible to benefit from the "exceptions" to Article 30 acknowledged by the Court (under the form of "imperative requirements"). And the Court goes on writing that the orders under scrutiny are not

"measures which are applicable to domestic products and to imported products without distinction but rather a set of rules which apply only to imported products and are therefore discriminatory in nature, with the result that the measures in issue are not covered by the decisions [on the exceptions to Article 30] which relate exclusively to provisions that regulate in a uniform manner the marketing of domestic products and imported products". (185)

However, the Court notes the Irish argument that

"this difference of treatment awarded to home-product articles and to imported articles does not constitute discrimination on the ground that the articles referred to in the contested orders consist mainly of souvenirs." (186)

And it then decides that :

"It is therefore necessary to consider whether the contested measures are indeed discriminatory or whether they constitute discrimination in appearance only." (187)

If the Court felt necessary to check if there was "effectively" discrimination and not only an apparent one, that implies that an apparent discrimination could have been not truly discriminatory. (188)

It is therefore likely that there is no difference between Article 36 exceptions and the ones of Article 30, except that the Court keeps the possibility to decide what is a "mandatory requirement" while it interprets strictly the exceptions mentioned in Article 36. Doing this, the Court is then in position to control the "Community cognizable interests" to which states can legitimately sacrifice the interest of uniformity of legislation in a similar manner to the one with which the American Supreme Court accepts states' burden on inter-state commerce only if they derive from the protection of a federally cognizable interest.

2.2.2.6. A Check : Bottle Cases

(1) When writing on the principles applied by the US Supreme Court and the European Court of Justice in free movement of goods cases, Sandalow and Stein were noting that

"An interesting test of the attitudes of the two Courts is presented by recent legislation, enacted in Denmark and several American states, prohibiting the marketing of beverages in non-returnable bottles. The effect of such legislation, apparently, is to substantially increase the transport costs of bottlers, thereby disadvantaging those who are at a distance from the market served. Moreover, the capital costs of complying with the legislation may impede entry into the market by bottlers whose primary business is conducted in a state that does not impose the restriction. The legislation has not, however, been enacted in pursuance of protectionist policy, but as a means of reducing litter. The question is nicely posed, therefore, whether, or under what circumstances, legislation may be enacted that fragments the "common market" in pursuance of legitimate state objectives." (189)

Both Courts applying a motive review to test the validity of legislation having protectionist effects, they arrived at the same basic result that despite their protectionist effects, the statutes were valid.

(2) We have already seen the solution reached in the United States. (190)

In the European Community, the problem arised with the Danish legislation on the re-utilization of paper and beverage containers enacted by Law No. 297 of 8 June 1978 and Order No. 397 of 2 July 1981. The Order lays down rules for containers for beer and soft drinks. Article 2(1) of the Order provides that such drinks may be marketed only in returnable containers, for which there is a system of collection and refilling under which a large proportion of containers used will be refilled. Article 2(2) subjects the use of returned containers to a formal approval which has to be given by the National Agency for the Protection of the Environment in each individual case and which may be refused if the Agency considers that the planned collection system does not ensure that a sufficient proportion of the containers in question will actually be re-used or if a container of equal capacity which is both available and suitable for the same use has already been approved.

An Order 95 of 16 March 1984 was adopted in order to take account of the Commission's objections to the System established by Order No. 397. It introduced a derogation from the aforementioned rules so as to allow the use of non-approved containers except for any form of metal container, either within

well defined limits (3.000 hl per producer and per annum) or in order to test the market, provided that a deposit-and-return system is established.

When reviewing the validity of the Danish bottle law,⁽¹⁹¹⁾ the European Court of Justice recalled its "established body of case law"⁽¹⁹²⁾ that in the absence of common regulation of the commercialization of products,

"... obstacles to free movement within the community resulting from disparities between the national laws must be accepted in so far as such rules, applicable to domestic and imported products without distinction, may be recognized as being necessary in order to satisfy mandatory requirements recognized by Community law."⁽¹⁹³⁾

When the Danish government argued that the system organized was justified by a mandatory requirement of protection of the environment, the Court agreed :

The Court has already held (...) ⁽¹⁹⁴⁾ that the protection of the environment is "one of the Community's essential objectives", which may as such justify certain limitations on the principle of the free movement of goods. That view is moreover confirmed by the Single European Act. In view of the foregoing, it must therefore be stated that the protection of the environment is a mandatory requirement which may limit the application of Article 30 of the Treaty."⁽¹⁹⁵⁾

♦

What the Commission was then contesting was not that the Danish scheme was discriminatory on its face but that

"... while formally applying to both domestic and imported products, [the collection system in force in Denmark] nevertheless puts imported products at a disadvantage in relation to domestic products."⁽¹⁹⁶⁾

Thus, the Commission observed that

"... compliance with the conditions imposed by the collection system, as devised and applied at present, requires the necessary infrastructure to be set up for the collection, sorting, storing and transport of containers and the completion of long and complicated administrative formalities..."(197)

All this would have a "dissuasive effect" on foreign producers and this "discriminatory effect" (this strange shift of formula is the one of the Commission) would mean that

"... it is not possible to justify the collection system as a mandatory requirement relating to the protection of the environment."(198)

The European Court of Justice recalled that in Association de défense des brûleurs d'huiles usagées"(199) it had said that

"... measures adopted to protect the environment must not "go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection".(200)

Then, for the Court,

"It is therefore necessary to examine whether all the restrictions which the contested rules impose on the free movement of goods are necessary..."(201)

First, the deposit system. Yes, it is

"... an indispensable element of a system intended to ensure the re-use of containers and therefore appears necessary to achieve the aims pursued by the contested rules."(202)

Therefore, the deposit system can not be considered as a disproportionate limitation on the free movement of goods.

Second, the obligation to use only containers approved by the national agency. Yes, it guaranties a

"... maximum rate of re-use and therefore a very considerable degree of protection of the environment..."(203)

But for the Court,

"... it must nevertheless be observed that under the system at present in force in Denmark the Danish authorities may refuse approval to a foreign producer even if he is prepared to ensure that returned containers are re-used. In those circumstances, a foreign producer who still wished to sell his products in Denmark would be obliged to manufacture or purchase containers of a type already approved, which would involve substantial additional costs for that producer and therefore make the importation of his products into Denmark very difficult."(204)

The Court has never been a great enthusiast of approval procedures handled by national administrative bodies.(205) What explains best the rest of the decision may be its efforts to avoid such a system of approval by a national agency.

The Court noticed that under the pressure of the Commission, the Danish government modified its regulation to authorize a producer to commercialize up to 3.000 hl of beer or soft drinks in non-approved containers - provided a deposit system is created. The Court estimated that

"... the system for returning non approved containers is capable of protecting the environment and, as far as imports are concerned, affects only limited quantities of beverages compared with the quantity of beverages consumed in Denmark owing to the restrictive effect which the requirement that containers should be returnable has on imports."(206)

Note that the Court was really plainly conscious of the restrictive effects of the Danish scheme. So much that it even used this restrictive effect as an argument against the limitations in quantity - to 3.000 hl - per producer and per year to imports of beverages in non-approved containers...! "Because the deposit obligation has a restrictive effect on imports, why do you limit the quantity which can be imported under the benefit of the derogation introduced in 1984", the Court said to Denmark ? "Well, Denmark could honestly answer : precisely because our deposit scheme doesn't have that much of a protectionist effect..." And maybe Denmark would have been right. But it was not really asked the question, maybe partly because the Court was after the approval procedure, which raised a risk of discrimination in the regulation as applied. The Court concluded :

"In those circumstances, a restriction of the quantity of products which may be marketed by importers is disproportionate to the objective pursued."(207)

Hence, the global scheme was upheld, but by limiting to 3.000 hl per year the quantity of beverages that any producer can commercialize in Denmark in non-approved containers, Denmark was held to have "failed (...) to fulfill its obligations under Article 30 of the Rome Treaty."

(3) As in the case of the Oregon Court of Appeals, the European Court of Justice was not after protectionist effect, but protectionist intent.

It might have gone further than that, actually ; but this is probably because of the "approval procedure", which is something which always makes the Court of Justice a bit nervous. However, the principle remains.

Why isn't the Court saying what it does - then - if it really cares about intent and not effect as it seems to say ? Well, Article 30 and 34 speak about effect, which is a good reason for the Court to appear as being doing what these Articles seem to tell it to do.

However, one could answer, isn't it a basic mistake to try to analyse the Court's decisions in terms of intent when the Treaty itself speaks of effect ? Even if the Court is really after intent in the cases, isn't the Court wrong and shouldn't the Court follow what the Treaty tells it to do and go after the bad effects on the common market ? Surely, the Court should do what the Treaty tells it to do. But the Treaty does mean intent when it says effect. And this is so because states are still sovereign in non-delegated fields and can act in the absence of Community action. (208)

(4) The Court might also be at times rather militant. But our basic point has been made : An integrated multi-state economy must have judicial procedures preventing the adoption of state measures motivated by protectionist intent, not the ones having protectionist effects. In both systems, the provision of protection by a states to its constituents is not a value which is accepted as deserving protection by both supreme courts, while the measures having protectionist effect only must be prevented by centrally-created norms, in the fields where states agree or have agreed in the past for such a creation. In truly federal states, legislative or quasi-legislative bodies exist to get round the barriers erected by measures having bad effects on inter-state commerce without bad intent. That is the case in the United States with the Interstate Commerce Power or the Spending Power of the US Congress ; in the European Economic Community, directives and regulations allow a reduction of the costs of diversity through uniformization. But the institutional mechanisms for the creation of central norms are of a wholly different nature than the ones preventing state protectionism. While only the prevention of protectionism under the form of discrimination can be made by a Court because it does not imply a political weighting of interests, the creation of central norms requires either a federal legislative body or coordination agreements or the establishment of voluntary standards.

With this teaching in mind, we will now study the necessary and possible improvements of the integrative institutions of the global-economy.

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PART III

TOWARDS A WORLD ECONOMIC CONSTITUTION

(1) We have shown in the first Part of this book how the geographic extension of the networks of micro-economic exchange relationships at the international level requires a development of international institutions. This is true whether there is spontaneous expansion of international economic exchange, requiring international agreement on the normative framework within which exchange should occur, or whether it is by political will that states want to increase the stream of micro-economic exchange among themselves.

The spontaneous expansion of economic exchange may raise issues requiring some sort of normative activity. The protection of consumers, of the environment, for example, may require that norms be adopted to prevent the importation or exportation of certain types of products having potentially harmful effects on consumers or the environment. Another possibility is that the sheer increase in imports in a given sector of activity may endanger the existence of the national

industry in such sector, which may appear as warranting some sort of protection to prevent the loss of jobs, the diminution in the value of the industrial assets in this sectors, etc... Whatever the value endangered by international economic exchange (consumer's health, the environment, jobs in a given sector of economic activity) the risk of leaving total independence on states to decide what norms to adopt is that they may do too much, go too far, and thus adopt norms not merely to protect the value at risk, but to prevent international economic exchange as such. Doing this, they may in turn endanger a great value, which is the openness of the international economy, with all the consequences this has in terms of justice and thus peace.

Even if states decide at some point in time that they should create an institutional framework adequate for a smooth functioning of the international economic system, because they think, for example that this is good as such to maintain ongoing peaceful relations, they may be reluctant to go as far as a full implementation of their earnest will would request, because they fear this would endanger their sovereignty too much.

(2) The second Part of this book has presented a taxonomy of the issues arising in economic integrations composed of several states, and the way they are addressed in the two major existing multi-state economic integrations : the United States and the European Community. We have seen that the various

issues presented in federalized common markets are the same in any multi-state economic integration based on market principles, be it so integrated that it appears to outsiders as a unity (such as the United States), or in the process of becoming a single polity (the European Community), or be it so divided that it does not appear as a commonwealth at all (GATT). We have shown that the existence of a certain degree of inter-state economic integration requires an appropriate institutional framework allowing the coexistence of (i) one (or several) authority(ies) with the capacity to create norms at the central level and (ii) states with an appropriate level of authority to create those norms which do not need to be created at the central level. This is so because in any multi-state economic integration, some norms have to be provided at a central level ("central norms") ; some others are better provided at the decentralized - state - level ("decentralized norms") ; finally, this dual capacity of norm creation (at the central and decentralized levels) implies the need for some type of procedure or institution (in federal systems, a court) to prevent the development of rampant protectionism. We have seen how the supreme courts in the two economic integrations we have studied have developed theories which basically are expressions of the same non-discrimination principle.

(3) Many of the institutions required today to integrate national economies are technical and of a facilitative nature,⁽¹⁾ and are properly developed through the classical

process of international law creation through treaties.

However, some of the international arrangements required for a proper functioning of the system composed by the integrated national economies are of a less mechanical nature for two reasons : (a) preventing all forms of protectionism requires the creation of a court system to check states' motives and (b) some issues in the international society cannot be addressed by norms adopted once and for all by treaty, but require a constant attention to the evolution of the situation in an area and a constant adaptation of norms to such situation. This may require the creation of functional international organizations with a specified functional jurisdiction, which may entail partial transfers of sovereignty.

(a) The institutional framework required for the functioning of the integrated international economy must comprise an anti-protectionism regime which function consists in permanently limiting the capacity of states to create norms and institutions having a protectionist purpose.⁽²⁾ We have seen in part II that this requires the creation of institutions able to screen the purposes of state authorities having normative power.⁽³⁾ The creation of such institutions at the global level would be a dramatic development in international economic law, and is absolutely unrealistic in today's world. But there is a trend towards such a development, and we must understand it to follow it and eventually improve the existing system so that its evolution will go in the right direction.

The theoretical analysis we have made of the rationale for the development of an anti-protectionism regime, combined with a sensible historical account of the development of the système des traités, and then of GATT, has shown how the function of the existing international anti-protectionism arrangements is to limit the capacity of legislatures to adopt protectionist measures.⁽⁴⁾ In short, in the same manner that national constitutions partly aim at organizing the functioning of the national system of creation of norms in a democratic manner whilst preventing a violation of the rights of the powerless and voiceless, international arrangements allowing governments to resist local demands for protection which satisfaction would be at the expense of others within the country and out of it without any justification acceptable in a market society pursue the same end.⁽⁵⁾ With regard to the political dynamic leading to the creation of international anti-protectionist regimes, in each of the historical instances of creation of free trade regimes we have recalled, we have seen that it is the national executive powers which, being more structurally inclined than national legislatures to defend the national interest - as opposed to sectional ones represented by members of the legislatures - have attempted to limit the ability of legislatures, both at home and abroad, to adopt protectionist measures.⁽⁶⁾ This was, in particular, one of the objectives behind the negotiations held to create an International Trade Organization after World War II, and which its poor substitute - the GATT - is trying to reach.⁽⁷⁾ We have also seen that

due to its birth defects and its very inadequate structure, GATT has only partially reached that objective, and has essentially failed to stop the rise of non-tariff barriers during recent decades.⁽⁸⁾

(b) Many issues in international society can be effectively addressed and solved only by common norms among states.⁽⁹⁾ In the absence of an effective system of central norms creation, any anti-protectionism regime created may very well fail simply because states may decide to act alone, and eventually to retaliate against states refusing to adopt norms perceived as being required, whatever the consequences on international economic exchange, and whatever the efficiency of their action. In this respect, both the scope and the nature of GATT are totally unsatisfactory to address this problem.

With regard to its scope, GATT deals only with trade in goods, and aims at reducing protectionism in this particular field. This does not suffice since the globalization of the economy raises issues in many more fields than the one of trade. Rules on foreign direct investment, on the international provision of services, on the movement of people to deliver the services, make the investment, sale the goods, etc... do not fall within the jurisdiction of GATT. A sensible anti-protectionist regime should address all these interconnected issues. The expansion of the scope of GATT has in effect been a central goal of the Uruguay Round of negotiations.

But even an extended anti-protectionism regime does not suffice and eventually may very well become meaningless if not accompanied by a development of the capacity to adopt international economic norms where common action is desirable. In the fields where such a need can be identified, functional organizations should be created with a capacity to adopt common mandatory norms.⁽¹⁰⁾

(4) The issue to be addressed now in this third and last Part is the one of the improvement of the existing international institutional system of economic integration. We will develop our analysis from our normative point of departure that the institutionalization of a market liberal system is the way to create a framework allowing the auto-regulation of society both at the national and at the international levels. We will try both (i) to identify the institutions which need to be developed for the liberal system to effectively function in a world of open borders, and (ii) to develop a proper approach and discourse to harness the forces necessary to create the international institutions of the liberal system and then to maintain them.

In both respects, there are major problems with the approach and arguments used by traditional advocates of a free trade regime. First, they seem to be willing to impose an unrealistic model of perfect competition and institutions on society. Second, they rely on states to create and - something which may be even more difficult - to maintain a free trade

regime in the long run, while states are complex political machines subject to opposing political pressures, which equilibrium varies permanently, which has for effect to permanently modify their short term interests and eventually their willingness to live up to their promise to maintain their economy open.

With regards to the institutional improvements needed, the mistake generally made by political scientists or politicians in using classical free trade theory to advocate a free trade regime is to use an approach presenting the problem of international economic integration in a mechanistic and unrealistic manner, which does not stress that the problem to be solved is the one due to the legal ordering of the world society - that is, the existence of a decentralized state-system as the original system of creation of norms both at the national and at the international levels.

A perfect liberal system does not exist in any domestic economy, and it is only a model which does not have to be dogmatically imposed on society. As we have seen, a function of the international institutional system is in effect to allow to reduce the disfunctionments of the liberal system, at the international as well as at the internal level. It is clearly not the economists' free trade theory which can provide a scheme of analysis allowing to reduce such disfunctionments, precisely because this analysis generally assumes a perfect world without politics and with perfect institutions. It thus proposes as a remedy to the problems created by the

decentralized state-system precisely something which is impossible to achieve : a non-interference by states in economic exchange. States should lift tariffs, they should eliminate quotas, they should not subsidize, etc... say the economists. This approach leads nowhere because the fundamental problem of international integration is not that states "interfere" with economic transactions by overtly protecting or otherwise subsidizing domestic firms or industries. They do overtly protect and subsidize, and this disfunctionment in the international liberal system is an issue which we will review later but which, conceptually, is relatively easy to solve, if it is politically difficult. The fundamental problem is that liberal states do structure economic exchange, and are actors in the transactional field, by their normative activity, and this is what theory has to find how to regulate prior to even think about the way to establish a regime preventing unwarranted state behavior. If there is no agreement on what is the proper role of government in a liberal economy, there is simply no way one can distinguish between appropriate regulation and disruptive subsidization. This does not mean that governments should do the same thing everywhere : decentralized collectivities may have different needs, different means, different traditions, etc... Governments are an instrument for common purposes and it is the people who should decide what governments do, because governments are here to serve their purposes.⁽¹¹⁾ Hence, governments should not be regulated in a quantitative way, but in a qualitative

one.⁽¹²⁾ As we have seen, it is not how much there is of any local government which is a concern for the international community ;⁽¹³⁾ the concern is in the type of means which can be used by governments to implement their policies. What our analysis of federalism shows is that these means should be such that they should not put the burden of policies on actors out of the states adopting them in situations where this is not a necessary consequence of the policies.⁽¹⁴⁾

With regards to the cornerstones on which an effective anti-protectionism regime must be built, we know from the previous Parts of this book that the non-discrimination principle is key : anti-protectionism regimes, be they found in constitutions or in treaties, are supposed to help governments to resist against demands for protection when they are illegitimate ; that's what the non-discrimination principle is useful for : it allows governments to refuse to give socially damaging favors in the name of superior principles to which they can claim to be bound.

To strike a new deal among states to eventually supersede GATT, states must therefore agree, on a reciprocal basis, on limiting subsidization, and in particular must agree to be bound by a non-discrimination principle. We have seen that the non-discrimination principle is already prevalent throughout the GATT, since the Most-Favored-Nation Clause and the National Treatment Obligation are central to its structure. However, the existence of these principles has not prevented the development of micro-protectionism, under the form of discrimination in

thousands of pieces of legislation or decision, and of macro-protectionism, under the form of Voluntary Export Restraints, or Orderly Marketing Agreements or the like.⁽¹⁵⁾ In order for the system to be such that the free trade principle will not tend to be undermined by a progressive creation of "exceptional" derogatory regimes (as has been the case with GATT), which politicians must accept in case of economic difficulties affecting a given sector of economic activity, the system must comprise effective procedures to prevent discrimination.

The institutional system to set in place must certainly be goal oriented in the sense that protectionism can take so many different forms that it is impossible to specifically deal with all of them in a document specifically prohibiting each of them : a commitment to non-protectionism, and therefore to non-discrimination, must thus be at the core of the international regime of economic integration. But the international anti-protectionism arrangement must then be process oriented around two main tracks :

(a) an effective anti-protectionism arrangement must be developed and be of such a nature so as to effectively impact on the process of domestic norms creation, so that norms are adopted without protectionist intent, or else may have their effect being nullified ;

(b) an effective escape clause must complement the system to allow for temporary relief under strict and mutually agreed conditions. When demands for protection are felt as being

legitimate or when political pressure is too strong for governments to resist, the most the institutions of the global economic integration can do is to (i) reduce the types of measures available to governments, so that they can use only specific means in specific circumstances accepted by all, reducing the risks of retaliation, and (ii) increase the visibility of their use, reducing the risk of increased use of protectionism in situations where it would be possible to avoid it if its victims were aware of what is going on.

Procedures are useful if there are actors to effectively use them. Even if theory can show us what type of procedural reform would be needed to improve GATT, the difficulty is to identify the political forces which can be used (i) to create a new anti-protectionism regime and (ii) to structure this regime in such a manner that it will improve over time, and not tend to become irrelevant to an international society in constant evolution.

We therefore have to deal with two issues, which are (i) the forces which can be used to build a new anti-protectionism regime and (ii) its structuring in a manner that it will evidence auto-constitution building properties through time. These are two separate but very closely connected issues. The answer to both of them requires an improved economic theory of federalism which will take into account the functional role of micro-economic actors both within the juridical system and in the political arena in the definition and evolution of the division of regulatory power in federal systems (§3.1). Taking

into account this functional role, we will see what type of forces could be used to strike a new deal among states, and how to institutionalize it so that it will lead to a progressive integration of the global-economy (§3.2).

3.1 AN EXTENDED ECONOMIC ANALYSIS OF FEDERALISM : TERRITORIAL AND FUNCTIONAL FEDERALISM

In classical liberal theory, the "market" is treated in an impersonal manner, as if there were no actors acting in and on it, apart from regulators setting the rules and economic agents too powerless to influence them. This may be a useful simplification for economists, but it is a mistake to neglect the existence of powerful economic actors in the market when the market is envisioned in an institutional perspective. As we have seen, the problem posed by protectionism is precisely due to the impact of economic actors on the political system creating the rules : firms, unions, industries, etc ... use their power to have the political system provide them with protection or other forms of subsidies. Protectionism - discriminatory state laws - is the produce of the interaction between the democratic process of law creation in advanced societies and corporate strategies to subvert this process in order to get protection from competition.⁽¹⁶⁾ Protectionism is a negative side effect of the type of interactions there are in our democratic societies between private corporate powers and public institutions. The increasing globalization of the economy now gives an incentive to enterprises and industries unable to face competition to have their state provide them protection and other forms of subsidies, and this is why institutional evolution is needed. The development of protectionism is possible, and the creation of institutions to limit it is difficult, precisely because the corporate structure of society is not recognized.

We will first elaborate on the consequences of the structural changes in the international corporate society which we have already identified in the first Part of this book, and in particular on the fact that the internationalization of competition among firms translates in a modification of the forms taken by the competition among states, which requires new international rules (§3.1.1).

The problem is that the mere functioning of a market-society requires the existence of an effective government limited by the rule of law : market society is inseparable from some sort of constitutionalism. For this very reason, the markets being now global, the effective provision by the public system of institutions of the appropriate rules needed in the global-economy requires the development above states of proto-federal structures. Simultaneously, apart from the issue of the allocation of power to the institutions having territorial jurisdiction in the global-economy, proper procedures need to be developed so that the division of regulatory labor among them functions. In order to restrict the use of sovereignty to what is proper in a market society, procedures must be developed so that the commitments undertaken by states - in a treaty/constitution for example - can be imposed on them through time. To develop the appropriate procedures, it must be recalled that in market society, firms share in the exercise of power due to their control over property rights and their capacity to create organizations

having power, but also that they often participate in the institutional schemes of creation and screening of norms due to the recognition of their judicial standing. They may be made actors in the positive creation of norms, through their involvement in procedures leading to the adoption of such norms. But they are also, in all existing federal systems, actors who can request the nullification of the effects of a norm adopted in contradiction with the provisions of the founding constitution or treaty : firms thus play a functional role in federal systems which is essential to the preservation and development of such systems (§3.1.2).

Since the extension of the global-economy requires the creation of proto-federal institutions at the global level, procedural mechanisms must be designed in such a manner that a use of firms, similar to the one made in the United States or in the European Community to deeply integrate these economies, will be made. We will see, in effect, that firms played an important role, due to their access to justice, in the institutional integration of the American and of the European Economies (§3.1.3).

In a last subsection, we will summarize the theoretical setting needed to develop proper institutions for the global-economy (§3.1.4).

3.1.1. Competition in the Transnational Economic Space and the Market for States

(1) A first step in the institutional analysis of the international economy is to recognize the existence of a space of economic transactions - international, transnational, global - within which diverse economic actors operate.⁽¹⁷⁾ The existence of this space modifies the positive legal ordering within which these economic relations take place, because it creates conflicts between states due to two separate phenomenon.

(a) On the one hand, the existence of this space may either increase the capacity of states to adopt legislations having effects out of their territory,⁽¹⁸⁾ or reduce the capacity of states to legislate on their territory.⁽¹⁹⁾ The origin of this reduction or extension of states' capacity to legislate with respect to actors acting on the economic space to which their territory belongs can be found in the differentiated control of states over structural power. It is evidenced by the extra-territorial application by some states of their norms, which in turn is possible due to the structural power they derive from their control over economic actors having extended international networks of transactional relationships.⁽²⁰⁾ The phenomenon of extraterritoriality has to be dealt with in international economic law, but is out of the scope of this study.

(b) On the other hand, the existence of a global economic space also entails conflicts between states resulting from the mere fact that the globalization of the economy reduces the effective capacity of states to legislate - to influence the outcome of market forces - because they are themselves subject to a kind of "market for states".⁽²¹⁾ The existence of a global economic structure ("the market") limits their individual capacity to influence on prices - that is, to legislate. That there is a "market for states" is highly visible when a multinational enterprise negotiates with several countries before deciding where to establish new production facilities, in order to get tax exemptions, subsidies, etc... But by "market for states", we mean more than that. The consumers in the market for states - mostly companies -⁽²²⁾ don't even need to make the market play by negotiating preferential treatment with state authorities. The mere fact that there is globalization of production and relative freedom of movement of goods, services and investments makes that there is a correlative reduction in states' capacity to legislate independently one from another. When consumers decide to buy foreign imported products, they also import the social, economic and environmental standards embedded in those products,⁽²³⁾ which limits states' capacity to loose track with what their competitors are doing in those fields. Not being responsive to the global tendencies would mean losses of comparative advantages for the domestic production, be it by local firms or multinational ones having local production

facilities. This is why "sovereignty" in economic matters is more and more akin to the autonomy of an actor on a market, who can differentiate himself from competitors, but who is not independent from the constraints imposed by the market. (24) States sovereignty, like economic actors' property rights, allows to adopt strategies of differentiation from competitors ; but it is the market, and not the actor (firm or state), which at the end will decide whether the strategy was correct or not. (25)

(2) What is challenged by the globalization of the economy is thus nothing less but states' sovereignty as classically understood. However, the meaning of the concept of sovereignty and its evolution is dependent on the evolution of the system within which it exists : in this sense, states' "sovereignty" still exists in the world of today in the economic field, but it is more akin to the idea of autonomy than to the one of independence. States can not adopt completely go-it-alone economic policies because this would have for direct immediate result to force them to isolate their economy from the rest of the global-economy. (26) States have only a marginal freedom to make political decisions in today's global economy : they still have a sphere of autonomy in the use of their capacity to act in the global system ; however, their actions in the economic field are not independent from the actions of other states in that same field, and their marginal capacity to act is dependent on the constraints imposed by the system they compose with other states and other public and private organizations.

In short, the global-economy can therefore be seen as a system of transaction among economic actors, with the various states having jurisdiction over either the transactions or the actors or both and trying to impact on (regulate) them, and in which private economic actors have a capacity to impact on states, by making the market for states play in order to get boons or protection.

(3) The economic/legal conflicts between states have their origin in the existence of a formally decentralized state-system : if there were only one global state, one would not be faced with the issue of competition among states... A direct consequence of the globalization of markets and of competition among firms in the economic space above the state-system is that it directly entails a qualitative change in the competition among states themselves ;⁽²⁷⁾ simultaneously, the existing system of international economic organizations and norms, which function is to reduce the dilemma there is between states' autonomy and the need for order in the international economy,⁽²⁸⁾ is challenged by the spreading of the economy over states' borders, since it appears to be unable to raise to its task.⁽²⁹⁾

It is important to notice that the change in the competition among states is only qualitative. Competition among states is as old as states themselves, in fact older than them, because it is competition among the masters of the land in Europe from the eleventh century onwards which has conducted to

the development of these specific organizations that states are. But whereas the most visible manifestation of competition among states used to be war, whereby states tried to achieve control over economic resources through an extension by force of their jurisdiction over a larger territory,⁽³⁰⁾ the struggle among states having a developed economy on their territory for the control over economic resources does not need to take the form of war anymore.⁽³¹⁾ Territory, in a global economy - with the direct produce of land (raw materials, agriculture, etc...) representing a shrinking portion of economic wealth - loses in importance for economically developed countries.⁽³²⁾ And consequently, competition among economically developed states does not take the form of war anymore.⁽³³⁾ However, this does not mean that there is less competition among developed states than among others and among developed and less-developed states. Competition simply expresses itself through other media than war.

(4) The tensions created at the institutional level by the globalization of the economy are then due to the fact that it implies new forms of competition among the organizations composing it (states and firms), to which the international normative system has yet to adapt. It is logical that international law, which initially developed to set the rules within which war could take place, would now tend to develop in such a manner as to regulate states' economic competition at the global level. And while territory, as the source of

economic and political power, and as the object of the struggle among states, was and still is a primary notion of international law,⁽³⁴⁾ it is logical that the other modes of gaining power in an international economy increasingly detached from territories would tend to fall in the realm of international law.⁽³⁵⁾ The object of international law is still to define the actors of the international competitive game, and its rules. But wealth and power are now associated with the control of more objects than territory only, and international law therefore evolves to take this development into account.⁽³⁶⁾

We will now see the origin of the need for rules in a society socialized by competition, and how this need is felt at all levels of the regulation of society.

3.1.2 Market Society and Limited Government under the Rule of Law

Since individuals are considered, in the liberal system, as being the primary holders of power, the nature of the division of regulatory labor in liberal societies implies that public actors provide rules only when necessary for the socially efficient functioning of the market economy, but also that they must modify them when they are or become inappropriate.⁽³⁷⁾ The globalization of the liberal system requires a development of international public institutions so that rules appropriate for the functioning of a global economy are properly provided at all levels where they are needed.

(1) In liberal society, the private exercise of power - i.e. the making of economic decisions by economic actors on the basis of a taking into account of their sole interest - is usually beneficial for all because rules (which can be modified in particular if the public opinion so requests through its representatives in national assemblies) exist which create a game in which economic actors, due to the mere existence of such rules, automatically take into account the interests of others in the pursuit of their private interest.⁽³⁸⁾ For example, if the reader recalls the Oregon bottle law,⁽³⁹⁾ prior to the law, producers of beer were packaging it in such a manner as to attract as much trade as they could from consumers, without necessarily taking into account the interest one may estimate there is in protecting the environment from

littering. After the law, by selling beer in refundable cans, producers were necessarily taking into account such interest, which the Oregon legislature had estimated strong enough to justify imposing rules concerning packaging on producers.

(2) Today, a proper functioning of the liberal global-economy requests a better system of provision of the rules of the game to be created in order to allow (i) a protection of the interests which are not comprised within the boundaries of one state (the global commons, i.e. the ozone layer, the Earth's climate, the oceans, etc...) and simultaneously (ii) a better protection of local interests which may, because of their inferior capacity to act collectively, be sacrificed to those of organized interests circumventing public institutions for their private ends.⁽⁴⁰⁾ With regards to both ends, the proper functioning of the international liberal global-economy implies the development of a regime limiting states' normative capacities.

(3) There is then one single fundamental problem in the global-economy : organizing competition among the various groups (public and private) and individuals composing it.⁽⁴¹⁾ Competition among private economic actors is at the root of any liberal economy, but it needs rules.⁽⁴²⁾ Left unorganized, private competition at the international level translates in competition among states ; and while such competition is positive in some instances, and has to be preserved (for example, it keeps taxes down and forces states to be relatively efficient as organizations and as regulators in most of the

fields where there is no systemic need for centralization),⁽⁴³⁾ in other instances (for example in the field of production pollution regulation) such competition itself has to be prevented.⁽⁴⁴⁾

By advocating a limitation of states' ability to compete, one necessarily heads into the concept of sovereignty as understood in classical international law. But it is necessary to realize that there are in fact two concepts of sovereignty in a market society regulated by a state-system. There is (i) the liberal constitutional meaning of sovereignty, which domestically defines the proper role of government in an individualistic liberal society ; there is then (ii) the international law concept of sovereignty, which is this concept pursuant to which the international society is an anarchy : states are solely subject to the rules they collectively give to themselves.⁽⁴⁵⁾

(i) Sovereignty, in its liberal constitutional meaning, fulfills a function, which we will call "internal", and which is provided for in national constitutions of liberal states. It is directly connected to the mere fact that the economy is liberal : because the economy is primarily regulated by private transactions among economic actors, and because such regulation can lead to results considered as politically inappropriate, there is need for a "sovereign" with jurisdiction over the considered economy and with a capacity to adopt those norms which will allow for a functioning of the economic game without these undesired effects.

(ii) Sovereignty in international law fulfill a function which is not particular to liberal society, but derives from the division of supreme public power in the international society among states. We will call it "external" for this reason. It is this norm of autonomy in the international public society according to which a state can do whatever it wants which is not contrary to international law.

The concept of sovereignty in international law is fundamentally different from the one in domestic constitutional law. No norm of international law requires a state to adopt a liberal system to regulate its economy.⁽⁴⁶⁾ However, once a state wants to adopt a liberal economic system, there is need for the development of institutions allowing for a limited government under the rule of law, defined by a constitution : an efficient and just functioning of a market economy requires the existence of an Etat de droit. The reasons for this are that efficiency and justice both require (i) that rules be set for the future only and be enforced in a equal and predictable manner, so that private planning is possible ; and (ii) that rules be changed when they are democratically determined to be socially inappropriate.⁽⁴⁷⁾

(4) The consequences of the need of an Etat de droit for a proper functioning of market society must be drawn at the level of the global economy.

(i) In our perspective, the analysis must start with the concept of internal sovereignty because the liberal system of socialization requires that there is always a sovereign able to adopt the appropriate norms when needed. In the liberal system, the regulation of society is primarily done through the autonomous functioning of market competition.⁽⁴⁸⁾ The sovereign is external to this "game", and normally only provides appropriate norms when needed, but must have the capacity to do so.⁽⁴⁹⁾ An important consequence of this fact is that with the globalization of markets and firms, there is a tendency towards the globalization of the liberal system, and therefore for a need in some instances of a "global" sovereign. I do not mean that there is necessarily need for the development of one global state. However, in some issue areas, there is need of global institutions, acting as functional surrogates of a global state, with an effective capacity to adopt norms mandatory for all, and therefore also for states. This may go against a preservation of sovereignty for external purposes in some instances, but it is a necessary consequence of maintaining sovereignty for what we have called "internal" purposes, but at the global level.

(ii) In parallel with this need to develop institutions having "internal" sovereignty at the global level, a proper functioning of national and international institutions also requests a recognition of the functional role that private

actors fulfill in the maintenance of the internal institutional equilibrium of federal and federal like systems, and which reduces the absolutism of a concept such as the one of sovereignty.

An understanding of the division of power among private and public organizations in liberal society as a sort of functional federalism (§3.1.2.1) allows to understand the fundamental role played by a concept such as standing in the inner development of federal systems proper (§3.1.2.2).

3.1.2.1 Internal Sovereignty and Functional Federalism

(1) As we have recalled hereabove, the internal economic function of sovereignty, which is to allow the provision of rules when the autonomous functioning of the market is such that it needs corrections, is the consequence of the type of division of labor existing among public and private actors with regards to the regulation of the economy in liberal societies.⁽⁵⁰⁾ As a consequence of the primacy of the individual in such society, it is possible to interpret the functioning of liberal society as a system of exercise of power, decentralized through property rights, and canalized with rules.⁽⁵¹⁾

This is a useful perspective for us because by using the transaction between economic actors as our unit of analysis of the liberal system, we can extend the economic analysis of

federalism by extending the analysis made of territorial federalism - that is, classical federalism - to develop a broader vision of the division of labor in the liberal system, which we can call "functional federalism". The traditional economic analysis of federalism analyses the various functions to be performed by public institutions of the liberal system and searches where the power to fulfill these functions is more appropriately located - i.e. in the states or in the institutions of the union.⁽⁵²⁾ "Functional federalism" would extend that type of analysis to include the role of private actors in the institutional division of labor among the various institutions regulating the economy in the liberal system. Our point is that private micro-economic actors - and particularly firms - participate in the regulation of the economy. Even in a unitary - non-federal - state, there is a division of labor among the public/political system of institutions and private economic actors to regulate the national economy, considered as a system of transactions ; even in unitary states, there is a sort of "functional federalism" in the sense that the power to make economic decisions is in principle left to firms which make an autonomous use of their power within the rules set by public institutions within the state-system. In liberal societies, individuals and firms have the freedom to do what they want with what they have without having to obey the commands of a hierarchy.⁽⁵³⁾ It is only when the result of the autonomous game of micro-economic actors is politically considered as inadequate that the liberal state intervenes to

modify the rules of the game. A consequence of this mode of structuring of liberal society is that when the competitive game leads to consequences considered to be negative, there is need for the existence of some authority having the capacity to intervene.⁽³⁸⁾ It is in order to fulfill this function that the concept of sovereignty is essential for internal purposes : this authority which has the capacity and means to intervene when required is what is called the sovereign.

(2) The basic framework of fundamental rights and principles necessary for the functioning of a market economy is usually defined in liberal societies in their states' constitutions : the constitution usually defines fundamental economic rights such as the right to property, and fundamental freedoms such as the freedom of movement, of employment, of contract, of enterprise, etc... It also often provides, particularly in federal systems, for a recognition of the functional role of micro-economic actors in ensuring the proper functioning of institutions. To protect the liberal organization of society, ideally the sovereign must not be allowed to adopt norms in contradiction with the liberal principles of market society. Several means can be created to prevent this from happening. One of them is to give standing to private economic actors to challenge the constitutional validity of norms adopted by states' institutions when they are considered as unconstitutional by the actor.

3.1.2.2 Functional Federalism and Positive Federal Constitutions - The Role of Standing

(1) One of the roles of constitutions is to organize the proper use of sovereignty. The three main functions typical of any legal system (law-making, law enforcement, and law determination) are entrusted to central organs acting on behalf of the whole national community.⁽⁵⁵⁾

The creation and modification of law is vested in an Assembly, a Parliament, ... generally speaking a legislative body. This legislative body is usually under a constitutional obligation to define rules for the common interest. However, we have seen how - in the field of trade - the process of norm creation can be circumscribed.⁽⁵⁶⁾ As it is only one of the examples where this happens, it is therefore necessary to have some system of courts to check that the legislative body does what it is supposed to do (defend the common interest) and nothing else.⁽⁵⁷⁾

The legislative body is not the only organ of a state having a capacity to create norms which may be improper in a liberal society. Modern executive powers, in particular, also have this capacity and need to be checked. Obviously, the institutions and procedures through which such check is made vary enormously from one national system of public institutions to another one. What states' institutions may do and how they are checked defies generalization. However, the existence of some form of control of normative activity on the basis of

constitutional documents or principles is increasingly present.⁽⁵⁸⁾ One additional element which is constant in modern democratic states, at least in federal systems, and which is essential for the preservation of the division of regulatory work is the standing of individuals or corporate persons, who have the capacity to challenge norms adopted in contradiction with the founding principles.⁽⁵⁹⁾ The existence of individuals' standing has fundamental consequences for the preservation of fundamental rights.⁽⁶⁰⁾ In the limited sphere of economic regulation, the standing of micro-economic actors plays a fundamental role for the determination and evolution of the allocation of regulatory capacity.⁽⁶¹⁾

(2) The institutional consequences of the understanding of micro-economic actors as holders of power - which we will partly attempt to draw now - has much larger implications than the ones we will show here.⁽⁶²⁾ Our purpose in this study of the international economic system is to present enterprises, and in particular multinational enterprises, as sub-parts of the institutional framework which we consider composes now, and will compose in the foreseeable future, the world order and to show how their inherent supra-national nature can be used for international industrial policy purposes at the world level.

The recognition of the liberal advanced market society as a corporate society is in this sense a strategic move aimed at potentially improving the functioning of the liberal system by a recognition of the possible use of corporate actors, of spontaneous institutions. There is nothing dramatically new in

the idea of using spontaneous social institutions to improve the functioning of the positive system of exercise of power, liberal regulation of the economy being self-regulation. However, the reform made necessary by the globalization of the economy requires the understanding of the nature of the interactions between the positive legal system and corporate economic actors.

The idea of this book is to use the fact that many enterprises tend to have their own interest structurally bound to that of the international economy and that they are relatively independent from any state authority to use them to integrate markets at the global level, in the same manner that the autonomy of national enterprises has been key to integrate national markets, in the United States and in the European Community. This did not require any positive legal recognition of enterprises ; nor will the integration of markets at the global level require a legal recognition of enterprises as positive legal actors in the global society. But in a sociological sense, in any federal economy partly integrated by the activities of enterprises established in the several states, the enterprise is a "private government" and a unit of functional federalism, as Miller wrote in the United States context.⁽⁶³⁾ What Miller calls the "supercorporations" are the institutions which have produced a national economy in the United States, which is superimposed upon a decentralized formal political order.⁽⁶⁴⁾ It is clear that corporations have no direct, express delegation of power from the

states.⁽⁶⁵⁾ But enterprises may still be seen as private governments because "the sociological corporate community may meaningfully be seen as a political system as well as an economic entity."⁽⁶⁶⁾ Given the role played in the development of the institutions of the United States by firms which had extended their range of activity over the whole national territory, one can conclude for the World (because the same applies ceteris paribus with their globalization at the world level) as Lerner did for America, that "a new constitutional structure in industry and government is emerging, with a new separation of powers that is more relevant to contemporary America [to today's world] than the classical separation of governmental powers."⁽⁶⁷⁾ In particular, the understanding of firms as being autonomous organizations above states' jurisdictions suggests that they are potential litigants who may require equality of treatment with local micro-economic actors, counterbalancing parochial protectionist forces. This is what happens in the United States and in the European Community when national enterprises could appeal to "federal" principles of non-discrimination when they are discriminated against. At the global level, the integrated corporate actors needed are already in place. What we have to do is introduce the principle of non-discrimination in such a manner that enterprises (through their positive corporate structure) can appeal to it, for the defense of their own interests, but with the beneficial social interests we have identified.

(3) Similar institutional challenges as the ones we know today at the international level have already occurred in the late nineteenth and in the twentieth century, first in the United States with the nationalization of markets following the extension of railroads, and then in Europe, where a mix of economic needs and political action has led to the creation of the largest multi-state integrated economy in the World. Institutional adaptation to the evolution of economic exchange requested a new interpretation of the American Constitution in the United States to allow the required rise in federal legislation and a concomitant diminution of states' capacity to adopt protectionist measures. In the European Community, the expansion of economic exchange requested some transfers of formal sovereignty to international institutions, which are still under way. In both the United States and Europe, the extension of the market above states' borders has led to constitutional changes in which firms played an important role as litigants. The European experience shows that international political action is possible, and what use of multinational enterprises can be made of to develop integrative institutions.

3.1.3 Extension of Economic Exchange and Creation of the Existing Federal Systems

We have seen that in the context of the United States, the modifications in the constitutional allocation of regulatory powers needed due to the "nationalization" of the economy and of the issues to be addressed through the political system of regulation occurred through a modification in the interpretation of the meaning of some of the provisions of the constitution.⁽⁶⁸⁾ The other side to this story - i.e. the importance of national enterprises in the creation and functioning of the new scheme of allocation of political power - should not be neglected (§3.1.3.1).

A parallel can be made here with the recent institutional developments which occurred in Europe, where the role of companies has been critical, both for the evolution of the internal functioning of European Community institutions as well as for their amendment (§3.1.3.2).

3.1.3.1 Enterprises and the Unification of the Federal Market in the United States

(1) The issue of non-tariff barriers which is puzzling international scholars nowadays has already been met within the United States domestic economy in the 1930s and 1940s. The creation of trade barriers between the states of the federal

union at this moment in history, mostly because of the economic depression, was the object of heated debates.⁽⁶⁹⁾ Newspapers were writing intensively about it ; conferences were called on the subject. Analogies with the balkanization which was occurring in Europe at the time were drawn, and the evil days of the confederation were recalled, when trade wars between the states of the Confederation were sometimes transformed into real wars.⁽⁷⁰⁾ One of the goals of the Framers of the Federal Constitution had been to create a system preventing such self-reinforcing animosities to develop :⁽⁷¹⁾ how was it possible that new trade barriers could arise when the Framers had sought to eliminate bothersome burdens on trade between states ?⁽⁷²⁾

The most compelling reason for the creation of non-tariff barriers at the end of the 1930s was without doubt the Great Economic Depression.⁽⁷³⁾ On the world scene, the depression resulted in tariff and quota wars between nations, which ultimately led to World War II and, as a reaction, to the creation of the GATT-system.⁽⁷⁴⁾ Within the United States, this road was blocked by the federal constitution.⁽⁷⁵⁾ But individual states still desperately tried to protect their local constituents against the effects of the economic crisis, sometimes at the expense of the interests of constituents of other states within the United States. In many states, pressure groups were formed to lobby for protectionist legislation. In addition, the rapid growth of nation-wide enterprises - especially at that time in distribution - was completely challenging and disrupting the traditional patterns of business organization.

In this world of changes, the remissness of Congress in passing federal regulations meant that the individual states of the Union were seldom restrained from action by federal laws.⁽⁷⁶⁾ And whereas the Supreme Court often upheld state laws despite their negative effects upon interstate commerce,⁽⁷⁷⁾ when Congress started creating legislation under the New Deal program, it found the Supreme Court in its way.⁽⁷⁸⁾ At the very moment that federal uniform legislation was needed to prevent the rapidly increasing enactment of state trade barriers, the Supreme Court invalidated several Congressional Acts.⁽⁷⁹⁾

The situation changed when the Supreme Court finally agreed in 1937 to interpret the Commerce Clause of the United States Constitution to mean that the US Congress had an unlimited power to regulate "inter-state" commerce.⁽⁸⁰⁾ This meant - as later developments will show - that it could regulate almost everything.⁽⁸¹⁾ Thus, all sorts of non-tariff barriers between the different states could be eliminated, so long as Congress had the will to do so.⁽⁸²⁾ Simultaneously, the power of states to regulate was upheld, with the sole limitation of the non-discrimination principle which effectively prevented them only to adopt protectionist legislation.⁽⁸³⁾

(2) The crucial role played by national enterprises in the increase in power of the federal government can not be underestimated. The corporate nature of American society is a well-known fact.⁽⁸⁴⁾ It is a club of "X-hundred", in the

expression of Daniel Bell, a conglomerate of many agencies and institutions which interact and in which the state is one - but only one - of the participants in the struggle for influence.⁽⁸⁵⁾ The consequence of the development of this "pluralistic economy" is that a new form of social order has been created, with profound institutional consequences.⁽⁸⁶⁾ One of them is that enterprises, as "private" governments, can usefully be viewed as units of federalism, of functional federalism.⁽⁸⁷⁾ They have no territory, but the surimposition of their networks of organized economic exchange, of their spaces of exchange relationships, over the decentralized formal political order of the federation has produced a national economy. National enterprises have unified the national market⁽⁸⁸⁾ because of their activities as producers, transactors, etc... but also because of their legal role within the federal structure of the US government.

In particular, the building of the non-democratic economic structures of firms upon the framework of democratic political theory has led to the development of the judicial power in the American polity.⁽⁸⁹⁾ In no small measure, the history of American constitutional law is the history of the impact of American corporate enterprise on the American scene.⁽⁹⁰⁾ There are many reasons for judicial review to be associated with federalism,⁽⁹¹⁾ but one of them is that by easing the extension of enterprises above state borders, federal or quasi-federal systems create potential challengers to decentralized legislations blocking interstate economic exchange.

Multi-state business was naturally concerned with federal law and the federal constitution, resisting the idea that every state in which it operated could regulate it.⁽⁹²⁾ In many ways, constitutional law developed favorably to large corporate enterprises.⁽⁹³⁾ Progressively, however, theories - in particular the non-discrimination principle - have developed which preserve the regulatory capacity of states without allowing them to use it for protectionist motives.⁽⁹⁴⁾ Enterprises played a key role in this process of constitutional law evolution : they were litigants in a larger and larger share of reported cases, they hired lawyers, created whole law firms to defend their interests. In doing so, they played a truly fundamental role in ensuring that some power exists outside the state to vindicate minimal standards of fair and equal treatment to citizens, and residents and strangers.⁽⁹⁵⁾ As noted by Collins, when merchants sue to enforce the Supreme Court's doctrine against discrimination, they certainly do it to defend their interest but as surrogates of their own state, as private attorney generals.⁽⁹⁶⁾ Spread over the national territory well before the rise of federal regulation, national enterprises were the force which allowed - with the correlative change in constitutional doctrine - to reduce state barriers to inter-state trade within the United States.

Enterprises have also played a large role in the internal evolution of the European Community. But here, they also have actively participated in the creation of the institutional framework itself.

3.1.3.2 Enterprises and the Unification of the Federal Market in the European Community

(1) The European Community has progressively acquired features which give it a quasi-federal nature.⁽⁹⁷⁾ The European system is recognized, as much as the American one, as forming a complex and interacting whole between official (state and intergovernmental) and unofficial (nongovernmental organizations and multinational enterprises) actors contending for power and influence.⁽⁹⁸⁾ In a system where the evolution of normative supranationalism is disconnected from the more shaky one of decisional supranationalism,⁽⁹⁹⁾ integrated business organizations are key actors to vindicate and obtain equality of treatment, and thus to force the effective implementation of normative supranationalism. The existence of the European Court of Justice in which they have standing to challenge the validity of the norms adopted by the European Community Institutions, has been crucial for the progressive integration of the European economy.⁽¹⁰⁰⁾ The system of allocation of power among the European Community institutions and the states must be respected by the Community institutions and by all the states.⁽¹⁰¹⁾ The Court is the institution which has assured the respect of this allocation of power through its interpretation and application of the founding treaties.⁽¹⁰²⁾ And while other institutions of the European Community, as well as the various Member States, have standing

to challenge the validity of legislation adopted in contradiction with the European constitution, individuals and companies also have this capacity, which gave them a great role to play in the effective development of European Community law. (103)

(2) In the United States, the rise of federal power followed the nationalization of the markets. (104) Federal power has progressively taken over fields of regulation as the need was increasingly felt for uniformity and the prevention of state competition in some areas. Federal powers could expand by using powers the Constitution was granting to it, but that it did not exercise before as a result of self-restraint.

In the European Community, a similar need for central norms as the one felt in the United states in the 1930s has been increasingly felt in the 1970s. But in this case, an institutional change was needed to improve the process of central norm creation. In 1981, Professor J. Weiler could write :

In the Community (...) we can trace on the one hand a more or less continuous process of approfondissement of normative supranationalism whereby the relationship between the (legal) order of the Community and that of the Member States has come to resemble increasingly a fully fledged (USA type) federal system. On the other hand, and contemporaneously, we can detect a more or less continuous process of diminution of decisional supranationalism, stopping, in some respect, only just short of traditional intergovernmentalism. (105)

What has happened since in the Community is a progressive rise of consciousness that many of the benefits of the "common market" were slowly eroded by persistent non-tariff barriers to intra-European Community trade, and that numerous new ones were indeed frequently introduced to protect vested interests and impede trade. The Commission therefore identified these non-tariff barriers in the so-called "White Paper" it presented to the European Council in June 1985. With a view to creating a "Single Market" by the end of 1992, the Commission set out in the White Paper a detailed programme of some 282 directives needed to create a "frontier free internal market" at that time. The White Paper list had the political advantage of setting forth concrete steps and deadlines, obscuring difficult political questions by focusing on the mission and reducing the issues to a series of apparently technical steps.⁽¹⁰⁶⁾ Advocates of market unification could thus emphasize highly specific, concrete, seemingly innocuous steps and long overdue objectives.⁽¹⁰⁷⁾ To implement the White Paper, a separate initiative was undertaken to limit national vetoes over Community decisions.⁽¹⁰⁸⁾ At its core, the Community had been a mechanism for governments to bargain since its creation.⁽¹⁰⁹⁾ Decisions taken by the Council had to be unanimous, providing each government a veto.⁽¹¹⁰⁾ The "Single European Act" - which replaced the unanimity requirement with qualified majority with respect to the instruments that have the completion of the internal market as their objective - is the institutional change which was decided to allow the implementation of the 1992 programme.⁽¹¹¹⁾

(3) The recent progress consisting in the creation of the "Single market", which is still under way, has made - and still makes - use of private forces in combination with public action.⁽¹¹²⁾ However, 1992 is not a story of mass movements, of pressure groups or legislators.⁽¹¹³⁾ It is the story of the political entrepreneurship of an elite drawn from the business community, national governments and the European Community institutions.⁽¹¹⁴⁾ A key factor in the 1992 enterprise has been the leadership of the European multinational corporations.⁽¹¹⁵⁾ Industrialists have been well ahead of politicians in the creation of the dynamic leading to the 1992 project.⁽¹¹⁶⁾ In the early 1980s - well before the White Paper - a booklet published by Philips proposed urgent action on the internal European market :

"There is really no choice, and the option left for the Community is to achieve the goals led down in the treaty of Rome. Only in this way can industry compete globally, by exploiting economies of scale, for what will then be the biggest home market in the world today : THE EUROPEAN COMMUNITY HOME MARKET."⁽¹¹⁷⁾

In 1983, business began to organize. The Roundtable of European Industrialists was formed that year.⁽¹¹⁸⁾ An association of some of Europe's largest and most influential multinationals, including Philips, Siemens, Olivetti, GEC, Daimler-Benz, Volvo, FIAT, BOSCH, ASEA and Ciba-Geigy, it was chaired by Pehr Gyllenhammer, chairman of Volvo.⁽¹¹⁹⁾ The Roundtable published several reports, including one that

depicted the economies of scale that would benefit European business in a truly unified market.⁽¹²⁰⁾ In parallel with their support to the political initiatives behind the 1992 movement and an intensive lobbying activity vis-à-vis the national governments, the business community also acted on the market place.⁽¹²¹⁾ A series of business deals, ventures and mergers took place, which is a critical part of the whole 1992 process.⁽¹²²⁾

Backed by this transnational industry coalition, the Commission could then play the role of policy entrepreneur.⁽¹²³⁾ It undertook the preparation of the Cecchini Report on the "cost of the non-Europe" - a 16 volumes report measuring the advantages which would be derived from the elimination of non-tariff barriers to intra-European Community trade, which took some time to be completed.⁽¹²⁴⁾ Together with European business, the Commission by-passed national governments processes and shaped an agenda which compelled attention and action.⁽¹²⁵⁾ Everything has occurred as if the Commission had in mind to use what is known now in social sciences as a "self-fulfilling prophecy".⁽¹²⁶⁾ By subsidizing the information on the costs of the "non-Europe" (the Cecchini Report), and advertising extensively the possibility that such costs could be reduced by a reform of the European Community institutions, the Commission has created a dynamic where private economic forces started to anticipate the institutional evolution, lobbied their governments in favor of the reform, and actually launched the movement in practical terms.

Public action, in combination with private reaction, has thus created - and is expected to create - macroeconomic results.⁽¹²⁷⁾ On the side of public action, the sequence of events was the elaboration by the Commission of the strategic concept (the White Paper), followed by a commitment made by the Member States (the Single European Act) ; credibility was then given to the reform by national legislative actions.⁽¹²⁸⁾ On the side of the private reaction, business planners anticipated the institutional move to get "first mover advantages" (initiating a movement of cross border mergers, joint-ventures, etc ...) over competitors within and outside the Community, giving followers incentives to adopt strategies similar to theirs. They thus gave its practical meaning to the whole 1992 enterprise, by increasing the density of the networks of intra-European economic transactions, thus building a sensible European Economy.⁽¹²⁹⁾

The American and European examples of the role played by firms in the federalization of the economy, and their common features, show how a conception of the production of law and institutions by something larger than the state apparatus and including the demands and actions of economic actors, local and global, and their capacity to resist against unwarranted norms must be adopted if one wants to think about the dynamic of the evolution towards a world economic constitution.

In both American and European cases, the standing of firms in federal courts has given them the capacity to challenge legislation impeding their activity, sometimes leading to the elimination of unwarranted norms, sometimes arising attention to issues requiring the creation of central norms.⁽¹³⁰⁾ In both cases, this role has been key for the delimitation of the role of states in regulating economic activity, and in the development of federal powers (in the United States) and of normative supranationalism (in the European Community). In addition recent developments in the European Community also show how firms can act to provoke an improvement of decisional supranationalism, of public institutions able to provide the unifying norms their transnational activity requires.

3.1.4 The Globalization of the Liberal World-Economy and its Institutionalization : the Theoretical Setting

The globalization of the liberal world-economy raises issues and challenges the capacity of the existing public system of institutions to develop the appropriate norms to answer to them in a manner similar to the one met earlier in America and in Europe. This challenge heads on into the concept of 'states' sovereignty, for two separate reasons :

(i) the liberal mode of regulating society requires the existence of a constitutional authority (which is usually, and was initially, a state) to adopt rules when market exchange is imperfect or leads to negative externalities.⁽¹³¹⁾ When states themselves become subject to the market because of the extension of micro-economic exchange above their frontiers,⁽¹³²⁾ this founding principle of market society requests that the "market for states" be curbed in some instances by the adoption of central norms, and in some other instances by the creation of central institutions ;⁽¹³³⁾

(ii) the concept of sovereignty in international law allowing states to do whatever they want which is not prohibited by international law,⁽¹³⁴⁾ a proper functioning of the liberal economy requires (a) that subsidization, in particular under the form of protection be limited by an international treaty, and (b) that part of

these state functions which cannot be adequately fulfilled at the decentralized level of states be progressively transferred to functional international organizations.

The challenge created for the normative system by the extension of markets and companies was less of a problem in the United States in the late 1930s because of the pre-existence of the Constitution (even though the allocation of power between the national government and the states was, and still is, a lively issue).⁽¹³⁵⁾ In Europe, this challenge led to what was, and still is, a political adventure ; but the European experience shows that it is possible to cope with most of the problems.⁽¹³⁶⁾ The European experience shows in addition that it is necessary to harness private corporate forces to create a new deal among states and to implement and maintain it.⁽¹³⁷⁾

The taxonomy of issues in connection with the process of norm creation at the global level is the same as the one existing in federal systems,⁽¹³⁸⁾ i.e. there is need for (i) an effective system of central norm creation (§3.1.4.1), and (ii) a regime of prevention of state protectionism (§3.1.4.2). Since states are subject to conflicting interests, which prevents them from fulfilling functions which must then be fulfilled by larger institutions and which may even prevent them from agreeing to necessary reforms at the international level, we will then see what types of forces need to be harnessed in order to be able to reach and implement a new deal among states (§3.1.4.3).

3.1.4.1 Improving the System of Central Norms Creation

(1) The need for an improved system of central norm creation is obvious. Faced with an increasing number of global issues, we need global rules and functional organizations to deal with them. However, it is unlikely that anything like a world federal state would or should be created. For one thing, the creation of an all-encompassing organization to deal with all trade, investment and related matters is a very unlikely step.⁽¹³⁹⁾ The granting of the authority to enact central legislation even to what would be only a multisectorial condominium⁽¹⁴⁰⁾ similar to the European Community is impossible in the world of today and any way probably unnecessary.⁽¹⁴¹⁾ In addition, there is no need for one big bureaucracy to take care of all the issues presented : a cluster of institutions can very well assure the extension of positive state functions at the international level in the different areas where such an extension is needed - and only there -, and when such an extension is needed - and only then. However, if the structure of the new international regime set in place may take the form of a cluster of institutions, the divergent nature of states' interests may require that issues be batched, in order to allow for more guids pro quos.⁽¹⁴²⁾

(2) Even if one considers only the narrower perspective of setting up a free trade regime without taking into account the other functional organizations which creation may be needed at the international level in the various fields where decentralized state action is ineffective, there is need for an improved institutional system providing international norms for the following reason : the setting-up of an anti-protectionism regime, even if it works properly, does not eliminate non-tariff barriers ; it eliminates only purposive ones.⁽¹⁴³⁾ Non-purposive non-tariff barriers must be eliminated by central norms.⁽¹⁴⁴⁾ One can notice, however, that an efficient system to eliminate purposive non-tariff barriers will isolate non-purposive (legitimate) ones, and allow to concentrate diplomatic efforts on their reduction, which can be done by creation of common norms and institutions.

(3) What is needed at the global level to improve the process of central norms creation is an improvement of harmonization, coordination and cooperation procedures in the different issue areas, which does not necessarily require the building of an all-encompassing far-reaching institution.

International arrangements are usually difficult to reach when they create costs for states because of the problems stemming from the fact that some states may render international agreements ineffective, by refusing to participate (hold-outs), or from the fact that some states may enjoy the benefits of international regulation, while refusing

to share its costs (free riders).⁽¹⁴⁵⁾ Both problems may prevent willing states to reach an agreement. The hold-out problem may even exacerbate the underlying problem.⁽¹⁴⁶⁾

There is one approach to the creation of international arrangements which may solve some of these problems : the so-called convention-protocol approach.⁽¹⁴⁷⁾ Unlike comprehensive agreements, the convention-protocol approach does not attempt to resolve all substantive issues in a single set of negotiations.⁽¹⁴⁸⁾ Rather, it segregates the negotiation of separate issues into separate agreements : states first adopt a framework convention that calls for cooperation in achieving broadly-stated goals ;⁽¹⁴⁹⁾ then the parties to the convention negotiate separate protocols providing the specific measures designed to achieve these goals.⁽¹⁵⁰⁾

This type of approach to the creation of international regimes may be used to create either harmonizing, coordinative or cooperative agreements. There are important differences between harmonization, coordination and cooperation as far as the impact on the national regulatory system is concerned, and the need for either of these three solutions varies according to the underlying problem to be solved. The decreasing constraints they create diminishes the difficulty of their adoption.

(i) Harmonization policies attempt to equalize conditions of competition and production throughout the area concerned, regardless of whether or not regional disparities might warrant differentiated policies.⁽¹⁵¹⁾

For example, the two principal methods of avoiding state competition in production pollution regulation - which competition entails over-exploitation of global commons (such as the atmosphere, the oceans, etc ...) - are harmonizations of environmental standards and of the principles which govern who shall bear the cost of environmental measures, and how these costs should be met.⁽¹⁵²⁾ However, such harmonizations are usually possible only between states at similar stages of economic development. Otherwise - except in case of a subsidization of the developing states by the developed ones accompanying the harmonization⁽¹⁵³⁾ - the harmonization entails an elimination of comparative advantage to which developing countries have difficulties to subscribe.⁽¹⁵⁴⁾

(ii) Coordination, on the other hand, seeks to adapt centrally determined measures to the various needs of different regions, according to their capacities.⁽¹⁵⁵⁾ However ideal this solution might look, it goes far beyond what states are usually ready to accept in terms of restraints on the use of sovereignty.

(iii) Therefore, the solution which is most acceptable - politically, socially and economically - in an economic integration which wishes to combine efficient free trade with the maximum retention of sovereignty is cooperation. It leaves to participating governments relative freedom to determine their own economic policies, but provides for a means of adopting them by mutual agreement when it is

discovered that they clash.⁽¹⁵⁶⁾ The main difference between this approach and the coordination approach is the way the decisions are taken.⁽¹⁵⁷⁾ In the coordination approach, policy decisions remain decentralized and it is only when conflicts arise that they are resolved through negotiation within pre-established procedures.⁽¹⁵⁸⁾

(4) With regards to the creation of international organizations, advocating partial transfers of sovereignty for external purposes to functional organizations is less offensive to states' jealously guarded independence than seems to be the case at first sight, and this for two main reasons :

(a) In practical terms, the globalization of the economy without a correlative extension of international public institutions implies a very large loss of sovereignty for internal purposes.⁽¹⁵⁹⁾ The mere fact that the economy of a country is liberal and open to the international economy means that the state of this country can not adopt whatever discretionary and arbitrary measures it wishes to : the liberal system is imposing its rule.⁽¹⁶⁰⁾ Norms, regulations, etc... have to be adopted while taking into account the set of constraints imposed by the world economic system. And therefore, without effective international public institutions, states may very well keep intact their sovereignty for external purposes, but have lost it for internal purposes. In such a situation, they are better off negotiating the procedures according to which they are going to express their voice in the

international arenas to which they will transmit part of their sovereignty for external purposes in order to recover - collectively - sovereignty for internal purposes.⁽¹⁶¹⁾ This is what is in the interest of the People, and modern states, after all, are supposed to be run in the interest of the People.

(b) In addition, with regards to the political feasibility of the extension of international economic law, one must distinguish two very different aspects of the international order - the political-military and the economic one - a wholly different kind of policy being directed at each of them,⁽¹⁶²⁾ which makes that limits on a state's independence in economic matters do not necessarily have to coincide with limits in the political-military field. Traditionally, strategic foreign policy has operated under looser legal constraints than foreign economic policy.⁽¹⁶³⁾ In contrast, foreign economic policy is addressed through a system (more or less effective) of internationally agreed rules or commitments.⁽¹⁶⁴⁾ As we know, the basic objective, in the field of economic policy, is stability of the policy framework itself, which ensures that plans and activities of firms, as players on the market, will not be disrupted, that competition will be maintained up to its ultimate implications and that the international price system will continue to function.⁽¹⁶⁵⁾ Thus, by nature, economic foreign policy is much more legal in its mode of operation than strategic foreign policy.⁽¹⁶⁶⁾ As we know, a major explanation for why it has to be so is that in today's corporate economy, the democratic process of norms creation

makes economic foreign policy much more vulnerable to pressures of private economic interests than strategic foreign policy.⁽¹⁶⁷⁾ And while the art of strategic foreign policy for governments is to discern changes and react promptly to them, the art of economic foreign policy is to know how to persevere in the face of change to achieve long term objectives.⁽¹⁶⁸⁾

The approach to the ways to achieve international economic order should then be based on wholly different principles than the ones used for the attainment of military order. There can be increased institutionalization of international economic intercourse, while the international military strategy matters are left uninstitutionalized. An increased isolation of the two spheres greatly simplifies the political difficulties there may be at the decentralized political level to agree to enter into some form of institutional international integration. Simultaneously, economic integration may very well progressively allow a reduction of the importance of military questions between the national societies integrated in economic commonwealths, potentially without the question of military alliance being ever raised. It is one of the ends of creating economic integrations.⁽¹⁶⁹⁾ It was, in particular, at the origin of the creation of the European Community and its successes in leading to a European Union where war is a virtual impossibility provides encouragements to create institutions achieving a similar result at a larger scale.

3.1.4.2 The Anti-Protectionism Regime

(1) As we have seen, the elimination of all types of non-tariff barriers can be realized in federal states by the creation of central norms.⁽¹⁷⁰⁾ Non-purposive non-tariff barriers, mostly due to diversity in legislations, can be eliminated in this manner. It is obviously also the case for purposive ones. At the same time, we have seen how even in federal systems many non-tariff barriers remain, precisely because such systems are not unitary states : member states are sovereign in some respect and they can always somehow regulate the economic activity under their jurisdictions.

If one wants to keep several states, which is obviously the case when one aims at improving international economic integration, non-tariff barriers can not be rejected per se. However, there is one type of non-tariff barriers states can not be allowed to create : the non-tariff barriers created as such, simply because they are barriers. The difficulty is to define rules and procedures to eliminate them. Like all other legal barriers, non-tariff barriers can be eliminated by central norms. More importantly for us, they can also be eliminated by judicial decision.

(2) A clear difference is to be made between the elimination of non-tariff barriers and the prevention of protectionism.⁽¹⁷¹⁾ We draw this conclusion from a study of the United States and the European Community, but because the analysis leading us to such conclusion is structural, we think

such distinction must be made in all federal or federal-like systems. On the international scene, there is one additional reason why the prevention of protectionism should not be left to the sole adoption of central norms through the international procedures of harmonization, coordination and cooperation to produce norms. If it is true that all types of non-tariff barriers could be eliminated by an increased creation of common norms at the international level, the process of international norms creation is generally so complex and so slow that it is impossible to use it to address all the instances of non-tariff barriers. In many cases, this would amount to a waste of international diplomatic resources. Most of the instances of non-tariff barriers taken individually are of so little importance for states that they can not waste their time persuading other states to remove them. In the aggregate, the effect of these micro-barriers is probably huge, if impossible to measure ; but they are just not the kind of issues diplomatic services wish to, and can, spend their time on. A system of elimination of purposive non-tariff barriers will thus have to be developed at the international level which will not make use of diplomatic resources.

The issue now is to find the forces on which states could rely to help them agreeing and enforcing a new deal among themselves to create a new trading system.

**3.1.4.3 Forces to Harness in order to Develop and
Implement a New Deal**

(1) In order to progressively develop the constitutional structure of the global-economy, an agenda has to be thought about carefully to create an institutional dynamic. Given the history of the recent progresses in European integration, the idea is to make the minimum amount of change so that the reaction of private forces will progressively create institutional gaps which will have to be filled in by institutional reforms which will create new private reactions, etc... The goal is therefore to set up an institutional system which due to its original structure will be easy to adapt to an increased integration of the global-economy. To be flexible, such a system would have to be based on solid foundations coherent with the internal logic of the liberal system. The idea is to initiate a dynamic by making an initial appropriate institutional change so that private economic forces, by their strategic adaptations to the new institutional setting, will increase the need for more international institutionalization, which will then occur by way of adaptations to the institutions originally created. The issue is to find where to start with in order to create the appropriate dynamic.

(2) We know that to create a new regime, states' executives need the backing of domestic economic actors who will benefit from the regime.⁽¹⁷²⁾ If society as a whole will benefit from an improved open trade regime, there will be winners and

losers among economic actors, and the later will have a tendency to resist any change. It is among states' executives that a "new deal" has to be made ; however, they have to be backed by strong pro-trade forces to counterbalance the protectionist forces expressing themselves through their representatives in national assemblies (mostly at the ratification level),⁽¹⁷³⁾ or otherwise. Not all industries and enterprises in a given state are backwards, protectionist and rent-seeking, and these which are not have an interest in expanding the potential size of their space of micro-economic relationships by having their state act to reduce the existing tariff and non-tariff barriers to international economic exchange. These forces are essential for the establishment of a legal regime suited to the needs of an open economy, either because they can initially request new negotiations, or because they can support such negotiations in the face of protectionist demands.

(3) States' executives will be able to agree on an implementable new deal only if they have the backing of the dynamic economic forces in their countries. A key word in past and present international economic negotiations has thus been "reciprocity", which is necessary to "sell" an international agreement domestically. States' executives thus have to negotiate on the basis of a reciprocity principle, which allows to counterbalance protectionist by expansionist forces. But on what must they try to obtain reciprocity ? One can trace a historical evolution of the meaning of the concept of

reciprocity, in a sense which indicates a possible rise of law, as opposed to negotiation, as a medium of solving many international economic disputes, which could be perceived as a dramatic improvement of reciprocity by dynamic economic actors.

3.2 STRUCTURE OF DEAL AND IMPLEMENTATION

(1) Reciprocity is a key concept in international law and for the GATT in particular. However, its definition is troublesome, and no absolute, general criteria has been developed to ascertain "reciprocity".⁽¹⁷⁴⁾ In the field of trade, the idea generally rests on the pragmatic but fallacious mercantilist fiction that it is possible to calculate the "balance of trade". There is also somewhere the zero-sum notion that the amount of world commerce is fixed so that one country can expand its trade only at the expense of its rivals, and that consequently, if expansion in one field of trade is allowed, for example by a reduction in tariff, it should be reciprocally compensated by a reduction of tariff protection in another field.

It is almost impossible during a round of tariffs negotiations in GATT to measure the value of a concession so that another concession can be accurately compared to it.⁽¹⁷⁵⁾ In practice, a rough measure of a concession's value is used.⁽¹⁷⁶⁾ One takes as a starting point the present quantity of goods that enter the country. This is then multiplied by the money saved on each item by the tariff reduction proposed.⁽¹⁷⁷⁾ But the fallacies of the method are obvious : in one sense, the value of the concession is the additional goods that will be imported due to the tariff concession, and this may be quite different from the computation described above, and would usually depend on elasticities of demand.⁽¹⁷⁸⁾

(2) Even though the idea of reciprocity is a somewhat artificial one, with no good criteria existing to determine the meaning of "reciprocity" or "mutually advantageous", once the bargaining process within GATT is achieved - for example after a round of negotiations - a country is bound to its commitments. In a sense, the value of a concept such as the one of reciprocity is that it allows to reach international agreements which then can be breached only at a cost. As we have seen,⁽¹⁷⁹⁾ the function of international economic law is to be part of the framework of procedures and constraints according to which public choices are made.⁽¹⁸⁰⁾ States could theoretically attempt to follow a free trade policy unilaterally - and some are actually advocating unilateral free trade as providing the same benefits as reciprocal free trade.⁽¹⁸¹⁾ This may be true on sunny days, but not when hard times come : constraints simply work better when they are imposed pursuant to reciprocal agreements ;⁽¹⁸²⁾ the existence of reciprocity allows much more to resist to demands for protection in case of difficulties than if the government must count on its own political strength to resist to the sirens' song.⁽¹⁸³⁾

(3) Many of the obligations in GATT are thus destined to maintain the equilibrium of the deal reached which, by definition, is reciprocally beneficial when agreed to but may not remain so through time. Provisions regarding non-tariff barriers are central to maintain on-going reciprocity.

In particular, in a regulatory environment in perpetual change, the National Treatment obligation, i.e. the obligation not to discriminate as between nationals and foreigners, is a key principle for the maintaining of reciprocity.⁽¹⁸⁴⁾ As Jackson puts it in the context of GATT,

"The national treatment obligation is one of the most important and also one of the most contentious of the GATT trading system. It has the potential of affecting a large number of internal regulations and government measures in any country, thus treading on national sovereignty and sensitivities, ranging from the way a country governs its environment protection, consumer protection, food and drug measures, safety measures, to tax laws, etc."⁽¹⁸⁵⁾

We have seen that in other mutli-state economic integrations, such as the United states or the European Community, the non-discrimination principle is really at the core of the integrationist regime.⁽¹⁸⁶⁾ This has led us to the conclusion that while the substantive content of trade law, centered around the principle of non-discrimination (i) as among imported and domestically produced goods (the national treatment clause) and (ii) based on the national origin of the imported goods (the most-favored-nation clause), is relatively fitted to its function, the institutional mechanisms existing to allow these norms to impact effectively on rule makers are deficient. Matters are even worse in other fields of international activity (services, investments) which are much less institutionalized than trade, and where discrimination is even more common. We will see how international negotiations could lead to a new understanding of reciprocity in international economic law, with

regards to the reduction of tariff barriers (§3.2.1), as well as with regards to non-tariff barriers, which may permit to develop procedures increasing the effectivity of non-discrimination (§3.2.2). Finally, we will develop a sketchy presentation of the quid pro quos possible in a global economic negotiation to show how, if an effective harnessing of pro-trade forces is made, a reform of the institutions of the international economy is possible (§3.2.3).

3.2.1 Tariff Barriers : The Creation of a Multilateral Free Trade Area

(1) The move toward freer trade and a correlative change in the notion of reciprocity started with the adoption of the "linear technique" for negotiating tariff reductions during the Kennedy Round.

The procedure adopted for the tariff negotiations during the first five Rounds⁽¹⁸⁷⁾ can be summarized in four steps.⁽¹⁸⁸⁾ The first step was for each country to submit a "request list" on which it detailed for every other participant the concessions (specified product-by-product) which it desired the other country to make. Second, each country would analyze the requests submitted to it and make an "offer list", which would indicate what tariff concessions it was willing to make in exchange for obtaining favorable treatment on its "requests". A third step was a series of bilateral conferences between negotiating countries to begin to develop the "bargain" between them. The objective was to obtain concessions roughly equivalent in "value" to those which a country gave up. In general, offers would be extended for particular products to the country which was the "principal supplier" of that product for the offering country. Finally, at some point near the deadline, all countries would finalize their "offer list". At this point, each country would have to evaluate the total concessions of all the other participants in the conference, to see whether it felt that as a whole they were

equivalent to the concessions which it was giving. If it felt that it was not the case, it would then notify the other participants that it was withdrawing from some of its offers to remove the imbalance.

At the Dillon Round, the item-by-item approach to tariff negotiations already proved too cumbersome. For one thing, the European Community was theoretically negotiating as one entity, but had to establish a common position among its members before it could negotiate on an item in GATT in Geneva.⁽¹⁸⁹⁾ This made progress during the negotiations almost impossible. But further, tariffs on many items were already so low that it was becoming increasingly difficult to obtain meaningful offers of further tariff concessions on a selective product-by-product basis.⁽¹⁹⁰⁾ It was thus concluded that it would be necessary for future tariff-trade negotiating rounds to utilize a "linear technique" for negotiating the reductions.⁽¹⁹¹⁾ At the Kennedy Round (1964-67), the so-called "initial offer" called for a fifty percent linear cut as a "working hypotheses". Agricultural products were generally excluded from the linear rule. On the basis of the fifty percent linear cut, countries were then entitled to table "exceptions lists", which were to be held to a "bare minimum" and subject to "confrontation and justification".⁽¹⁹²⁾

(2) The further one goes toward the elimination of tariff barriers, the more difficult it is to get tariff concessions in item-by-item negotiations. Adopting another solution - as was

done during the Kennedy Round - in order to go further in the reduction of tariff protectionism implies a qualitative change in the conception of reciprocity.

Item-by-item negotiations corresponded to the idea of the GATT's framers as providing a balance between the concessions granted and the ones received, and protected by GATT law. In financial terms, measuring the value of concessions is extremely difficult, if not wholly impossible. In any case, the move toward a "linear reduction" evidences a change in the perception of what reciprocal concessions are. It is not the equilibrium resulting from a sum of micro-concessions for each of the items involved, but a global "disarmament" where reciprocity is achieved by the application of a common formula to each Party's tariffs.⁽¹⁹³⁾ The introduction of the "linear technique" was in a sense a departure from reciprocity as traditionally understood.⁽¹⁹⁴⁾ It was also the introduction of a new criterion for measuring reciprocity.⁽¹⁹⁵⁾

(3) The new criterion for measuring reciprocity is absolute when one arrives at a free trade regime. In a sense, when one encompasses the whole process of the progressive establishment of a free trade area, it might be possible to say that the states involved made reciprocal moves. But when one looks at the final steps of the negotiation - when the decision to go toward a free trade area in the course of a fixed period of time is not made at the outset, as is the case for GATT - then it is almost impossible for the last tariff concessions to be "balanced", even in theory. A possible solution is to decide - at some point - to

get rid of tariffs entirely, and to create a Free Trade Area. The creation of a Free Trade Area among all those members of GATT which would wish to participate is a solution which can be contemplated today, given the generally low levels of tariff averages. A similar proposal has already been made by others.⁽¹⁹⁶⁾ One of the advantages of such a solution is that it would represent a very visible political move, which would appeal to pro-trade forces much more than intricate, complex, and often seemingly meaningless negotiations. By mobilizing pro-trade forces, this solution would make it easier to defend the agreement against protectionist forces, using dynamic forces, by making reference to a new principle of reciprocity. This would be particularly true if in addition with an elimination of tariffs, institutional mechanisms would be created to allow a proper treatment of non-tariff barriers issues. Reciprocity then would not be based on a "balance" of tariff concessions, but on an equality of access to the national markets of the member states of the Free Trade Area to their respective nationals.

However, the drawback of this solution is that it may request a partial abandonment of the principle of the Most-Favored-Nation, since only those who accept to join the Free Trade Area should enjoy free access to the markets of its members.

(4) We have seen the role of the MFN clause in ensuring reciprocity in the GATT-system and as one of the major premises underlying the present GATT-system. However, MFN can have a strong inhibiting effect, especially in the final steps of the

institution of a free trade regime.⁽¹⁹⁷⁾ If a nation refuses to offer adequate concessions in the negotiations, because of MFN and the idea of reciprocity, other nations will be reluctant to grant any concession that would benefit the hold-out.⁽¹⁹⁸⁾ If the hold-out is a major trader, it is hard for other states to make meaningful concessions that won't benefit it, and thus the negotiations will proceed at the pace of the slowest.

One possible way to avoid this problem is a limited departure from MFN, allowing nations that so desire to proceed further and faster in their reciprocal concessions without granting the benefits to the holdouts.⁽¹⁹⁹⁾ A "Free Trade Club", for instance, can be created for all those who want to enter a process to do away with tariffs entirely. Such a club can be allowed in GATT either by a waiver or by a complete fulfillment of the conditions set in Article XXIV of the General Agreement.

One way to harness pro-trade forces in favor of a new integrationist regime is therefore to go all the way towards a free trade area. But it is in the field of non-tariff barriers that trouble with the concept of reciprocity has been particularly felt, and where progress is mostly needed to create a regime which would have enough appeal to free traders that they would have an incentive to mobilize against protectionists. We will now see along what lines reform could be contemplated.

3.2.2 Non-Tariff Barriers

(1) Non-tariff barriers have arisen as an issue in international trade because of the relatively low level of average tariff rates.⁽²⁰⁰⁾ The interconnection of national economies it entails makes much more sensitive the erection of non-tariff barriers. These are felt as nullifying the positive effect of the reduction of tariff barriers and as challenging the reciprocity of advantages derived under GATT. However, recourse to the dispute resolution mechanism existing in GATT is largely inefficient in eliminating non-tariff barriers. The whole problem of the "balance of benefits" which the dispute resolution mechanism in GATT is designed to ensure⁽²⁰¹⁾ is that as long as there still remain tariff barriers, the benefits under the Agreement are necessarily relative ones, weighted ones, even if imperfectly so. The preservation of the benefits reciprocally granted during the negotiations requires a kind of weighting - itself diplomatically realized - if within the legal framework provided by GATT. This necessarily leads to a political process of dispute resolution, with solutions generally unsatisfactory for the economic actors hurt by non-tariff barriers.

(2) As a consequence of the progressive reduction of tariff barriers, the benefits which are important for states' governments and constituents to obtain are less and less the ones of tariff concessions. The single most important benefit to obtain under GATT is the elimination of discriminatory treatment in a more general manner. Such elimination has been the goal of GATT from the outset, and was proclaimed in GATT's Preamble, where the Contracting Parties announced their intention that :

"... their relations in the field of trade and economic endeavour shall be conducted with a view to raising standards of living ... by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade."(202)

The concern over non-tariff barriers started in the sixties, (203) but it was only during the Multilateral Trade Negotiation ("MTN") of the Tokyo Round that the issue was seriously addressed and that somewhat elaborated rules were formulated. (204) The MTN produced an extensive series of complex and technical Agreements, and the scope of the GATT-system has been greatly broadened. (205) The negotiators elaborated on the weak constitutional structure of the GATT to develop its function in the global-economy. For example, the negotiations included a major effort to provide a framework of principles for managing problems arising from product standards that affect trade. An Agreement on Technical Barriers to Trade (206) has been adopted. It concerns all types of product standards, including technical, health, safety and consumer protection standards in addition to environmental ones. Under the Code, the Signatories announce their desire to

"... further the objectives of the General Agreement", (207) "to ensure that technical regulations and standards (...) do not create unnecessary obstacles to international trade", (208) [while] "recognizing that no country should be prevented from taking measures necessary to ensure the quality of its plant life or health, of the environment or for the prevention of deceptive practices, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or

unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade" ;(209) [and evidently] "recognizing that no country should be prevented from taking measures necessary for the protection of its essential security interests".(210)

To implement these goals, the Code provides that

Parties shall ensure that technical regulations and standards are not prepared, adopted or applied with a view to creating obstacles to international trade. (...) They shall likewise ensure that neither technical regulations nor standards themselves nor their application have the effect of creating unnecessary obstacles to international trade.(211)

It clearly appears from the highlighted portions of the citations of the Code that what the parties to the Code were after was not the effect on trade of states measures but the presence of purposive protectionism. When they speak about effect on trade, it is in connection with unnecessary obstacles to international trade. The coherence with the lessons which can be drawn from the comparison between the American and European case law on the prevention of states' protectionism is obvious.(212)

It is only when one arrives at the consultation and dispute resolution mechanism that the unfortunate terminology of Article XXIII of GATT is used. Thus,

If any party considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired (...) and that its trade interests are significantly affected, the party may make written representations and proposals to the other party (...).(213)

Thus, the trade interests of a country have to be "significantly affected" before it can use the dispute resolution mechanism. And then, such country can make "written representations and proposals".... It is by writing such clauses that one leads people to believe that GATT means General Agreement to Talk and Talk. It is clearly recognized in the codes elaborated during the Tokyo Round that nondiscrimination is the key principle in the elimination of non-tariff barriers. But the existing dispute resolution process is ineffective here. A new system needs to be built, based on a different - additional - conception of reciprocity : a qualitative one, entailing effective enforcement procedures.

(3) It is certainly a necessity to have a dispute resolution process working partly as a negotiation procedure for GATT as a whole. But the existing dispute resolution process is ill-adapted to effectively address the problem of many purposive non-tariff barriers. In particular, the existing diplomatic dispute resolution mechanism is not well adapted to deal with the thousands of instances of micro-discriminations.

But to see the core function of the GATT-system fulfilled, which is to allow to resist against internal demands for protection against foreign competitors, realism requests that non-tariff protectionist measures be put in two categories, a different type of treatment being warranted for each of them. There are, on the one hand, forms of macro-protectionism, such as the effective prohibition of the importation of Japanese

cars above a certain level, or the effective prevention of the importation of some agricultural products. Such high-track protectionist measures are so politically charged that the most one can hope for in the coming reform is to improve the safeguard clause, so that it is effectively and exclusively used, which should have for effect to reduce macro-protectionism overall (§3.2.2.1). There are also, on the other hand, thousands of instances of micro-protectionism, for example under the form of discriminatory regulations in standard requirements, product certification procedures, etc... To address this form of low-track protectionism, which is not politically sensitive, a juridical system of elimination of protectionist measures must be set in place (§3.2.2.2).

3.2.2.1 Hight Track Protectionism

(1) To determine the content of the rules to be created at the international level to allow resistance against protectionist demands, it is necessary to distinguish between low-track non-tariff barriers and high-track non-tariff barriers. In making this distinction, we mean that there are some barriers which removal is highly politically sensitive and difficult while the removal of others is less so. It is obvious that in some sectors of activity, a dramatic and sudden increase in international economic competition can only lead to disruption, massive unemployment, social unrest and all the accompanying political problems one can expect. If the purpose

of the international trading regime is to allow to resist against protectionist forces, there is a level above which no piece of paper will allow any government to resist against the shouting demands of hundreds of thousands of demonstrators on the streets. For example, if the European Community would open the European car market to Japanese competition from one day to the next in these early 1990s, there would be riots, and there is no way any European government with a national car industry could resist against them in the name of free trade, réciprocité, economic order, the fundamental principles of market society, etc... Damaging effect resulting from competition has to be dealt with under today's political conditions and, since we have not reached a level of political integration such that redistribution policies can be decided at the international level by an international institution, it can be so only in a decentralized manner. Decisions to give assistance to declining domestic industries have to be accepted as legitimate, even when they create major problems at the level of the international economy. The only improvement we can hope to make at this level and at this point in time is in finding agreement in the forms that assistance can take, their duration and the means which can be used to increase the visibility of their use. If it is clear that modern democratic political regimes can not resist highly vocal - "high track" - internal demands for assistance, the international trading system can still fulfill its function which is to allow to resist against demands for protection.

We will see with an example the consequences of an ineffective and inapplicable escape clause, such as the one existing today, in this respect.

A recent and paradigmatic example of an unsatisfactory regime of high track protectionism is the one of the agreement between the European Community and Japan on cars (hereinafter the "Agreement" or the "Car Agreement").⁽²¹⁴⁾ The origin of the Car Agreement is to be found in the European Single Act, which is to create a frontier free internal market by January 1, 1993.⁽²¹⁵⁾ On that date, there are supposed to be no more customs posts between European Community Member States. However, until the European Single Act was signed, there still existed in some Member States national import quotas restricting the importation of Japanese cars in some national markets.⁽²¹⁶⁾ The existence of such national quotas was at odd with the existence of a Common European Commercial Policy, which is a component of a common market,⁽²¹⁷⁾ but it was explainable for historical reasons : European Community Member States were allowed to keep the GATT-acceptable import restrictions they had before they joined the Community.⁽²¹⁸⁾ With the 1993 single market and the elimination of border controls, the administration of national quotas would have been impossible. The countries with quotas did not want to allow free Japanese competition on January 1, 1993, while countries without restrictions were reluctant to agree on a European wide Japanese car quota. During 18 months, the European Commission, the governments of the 12 Member States and the Japanese

government negotiated to settle there differences. The Agreement which has been reached has not been published, which is a problem in itself since consumers' and taxpayers' money has been, and will be, taken away from them by people who can not be made politically accountable for it since it is difficult for European citizens to evaluate the cost of their policy. However, elements of the Car Agreement have transpired in the press, ⁽²¹⁹⁾ and are the following :

(a) The European Commission estimates a European car market of 15.1 million in 1991. On this assumption, an agreed "forecast" of demand for Japanese imports to the European Community in 1999 of 1.23 million vehicles ⁽²²⁰⁾ has been based. This last figure, however (i) is not a formal limit and (ii) excludes vehicles from Japanese car plants within the European Community, the so-called "transplants".

(b) The Agreement covers a seven-year transition period, which is supposed to clear the way for a completely open vehicle market on January 1, 2000. It includes elaborate monitoring procedures and targets for individual national markets :

(i) The European Commission and Japanese officials will meet twice a year for consultations to monitor the Agreement.

- Each autumn, they will examine the export trend for that year, the forecast of exports for the following year and the preliminary outlook for the level of exports for the year after that.

- Each spring, they will examine the actual export outturn for the previous year, the forecast level for the current year and adjustments to targets if necessary. It is provided that the so-called "agreed forecast of demand for Japanese imports" will be adjusted "in an equitable manner", the Agreement noting that "Japan bears in mind the EC's concern that the necessary adjustments of the EC manufacturers towards adequate levels of international competitiveness would be affected if EC manufacturers can not enjoy the adequate benefit of market growth or if they face improper decrease in the production level in a contracting market".

- (ii) Exports to countries where restrictions still apply will continue to be monitored until the end of the Agreement, when they are supposed to be abolished. The monitoring will be in accordance with forecast 1999 Japanese exports to these markets of 199,000 units to the United Kingdom, representing 7.03 per cent of a forecast UK market of 2.7 million vehicles ; 150,000 to France (5.26% of a 2.85 million units market) ; 138,000 to Italy (5.3% of a 2.6 million market) ; 79,000 to Spain (5.3% of a 1.475 million market) ; and 23,000 to Portugal (8.36% of a 275,000 market). (221)

Aside from the formal Agreement, there is an unwritten "understanding" that the Japanese won't drastically increase car production at their plants in the European Community beyond their current plans to produce 1.2 million cars by the end of the century.⁽²²²⁾ The overall Japanese market share should thus increase from a current 11% to about 16%.⁽²²³⁾

French and Italian producers have been most active to request protection, while the Northern European Community countries pressed for freer trade. The heart of the negotiation centered on Japanese producers' market share, and on whether transplant production would be included within the Agreement or not. Formally including transplant production within the quota would have been contrary to the principles of the Single Market ; it has therefore been excluded from the Agreement. However, there is this "understanding" on the 1.2 million car ceiling of production within the European Community which, coupled with the monitoring procedure and a broad "equity" principle, is bound to lead to a political clash between Britain, Italy and France. According to British government estimates, Japanese car manufacturers in effect will be producing 2 million vehicles a year within the European Community by the end of the decade, and 1 million in the UK alone.⁽²²⁴⁾ That would give Japanese producers a 21.2% market share, which is far more than French and Italian producers are ready to accept. The discrepancy between the official EC "understanding" and the actual figure is explainable by the fact that the increase in transplant production is less of a

problem for national governments than for national producers : transplant production creates jobs and reduces the political tension streaming from the economic difficulties faced by national producers. Their main concern should then be with regards to the localization of transplant activity, which they should try to attract (as Britain already did).⁽²²⁵⁾ Leaving the Agreement somewhat hazy on the transplant issue allows to give short term satisfaction to national producers (the "understanding" on the 1.2 million ceiling) while keeping open the possibility to increase transplant production, as long as it is somewhat evenly located.

Overall, this Agreement is unreal, and shows how managed trade can, without a proper framework of principles and procedures, lead to unacceptable results in the context of a liberal market society :

- (i) The first reason why such an agreement is unacceptable is that it simply won't lead to free trade in cars in 2000. We are said that it takes 7 years of "transitory period" for the Japanese market share to go from an 11 to a 16%, when free trade is supposed to occur. But it has been estimated that a sensible transition period of seven years to free trade would move the permitted Japanese market share by 3% or so a year.⁽²²⁶⁾ Pretending that the Car Agreement will allow breathing room for European producers so that they get ready for free competition in year 2000 is nothing but

a lie : European producers have been fighting during 18 months for an Agreement which allows one-fourth of the increase of market share which would be necessary to allow them to get used to free competition ; those who say that on January 1, 2000 they will let the Japanese market share increase by an additional 15% almost overnight are nothing but lying. As The Economist's writes : "a political showdown in 1999 has been built in from the start, and the protectionists will again be able to say that they need more time."⁽²²⁷⁾ This is true for the overall quota, but this is even more so for the remaining national ones. The Car Agreement allows the Japanese market share to go from a 3.5% in 1991 in France to a 5.26% in the course of seven years... or from a 2% in Italy to a 5.3%! Who can believe that Europeans, and French and Italians in particular, would be stupid enough to believe that in 2000 Jacques Calvet, the now president of Peugeot who has been virulent on Japanese bashing, or his successor and peers, will accept that French or Italian people should be free to buy the car they want ! But the negotiations were secret, the Agreement is unpublished, and the whole scheme has been presented as a great victory against the invasion of the yellow man ...

- (ii) The Agreement will be costly to consumers, but no one knows the amount of the bill.⁽²²⁸⁾ In addition, the Agreement will also be costly to taxpayers : getting protection is not enough for European car makers ; now,

they want subsidies and are lobbying the European Commission for help. (229) The Commission has said that it was not ready to provide the kind of bailout it did for the steel industry in the 1980s, but that it was working on help to finance research and development and worker training programs. (230)

(iii) All this waste has been decided secretly by people who have been defending the interest of the only sector of activity directly involved : the car industry. While the French and Italian car industry is responsible for its own inefficiency, (231) consumers, taxpayers and the economy as a whole will pay for the protection from competition provided by the Agreement. But their voice could not be heard because of secrecy. (232) Secrecy has prevented consumer resistance, but also the linking of this protectionist issue in Europe to other protectionist issues in Japan. While the opening of the European car market to Japanese competition could have been negotiated against the opening of the Japanese market for some European industries, the only elements in the negotiation were the amount of protection provided to European producers, and the quantity of "transplants" allowed.

(3) A refurbished escape clause within which such type of high track protectionism could be dealt with would prevent such absurdities. Its main principles would be the same as the ones of the existing escape clause of GATT (Article XIX) : (233) In

case a domestic industry would be seriously injured by foreign competition, a Contracting Party would be authorized to suspend compliance with its GATT obligations. The existing escape clause requires the Contracting Party to previously inform GATT and, absent critical circumstances, to consult with it. If agreement on the action is not reached, affected Contracting Parties can suspend equivalent concessions, subject to disapproval by the CONTRACTING PARTIES. A new escape clause would also provide for domestic adjustment to assure that the safeguard mechanisms will be temporary.⁽²³⁴⁾ Ideally, there should be prior GATT agreement to the use of protection ; but even if there is only prior information, this should be made in such a manner that the use of the procedure would be public, allowing resistance by the affected Contracting Parties, but, more importantly, by the affected domestic interests of the state contemplating to provide protection, which would increase domestic resistance to the project. The regime to limit high-track protectionism would have to be structured in such a manner that it would cost something to the government to adopt such a policy so that it will have an incentive to resist demands against which resistance would be less costly politically than providing protection. For example, if it would be necessary to request authorization to provide temporary protection, or at least to inform on the intent to use protection prior to its use, allowing for a possibility for harmed states to react and request that a case be made to demonstrate the need for protection, this would imply several

costs for the country requesting protection : there would be a cost in prestige ; more importantly, if the regime would provide for the possibility of some form of retaliation, to be announced during the phase of international negotiation on the use of the escape clause, this would allow domestic resistance from the part of the domestic industry retaliated against. International negotiations on temporary assistance would allow the country whose industry would be the target of protection to link the issue to some difficulty felt by some other of its own industries. It could threaten to provide them protection. This would eventually raise political activism from the part of the corresponding industry in the first country, which exports could be threatened in retaliation to the originally contemplated protection. This should have for effect to reduce protection overall. In this manner, which high-track demands for protection deserve protection would be determined more by the resistance capacity of the decentralized political system of the state contemplating to give protection than by international negotiations, where agreement would be difficult. It is only for those demands against which the national political system can not resist that their would be managed protection.

In cases of high track protectionist demands, the only improvement possible therefore is the one of the rules according to which states may legitimately grant protection. But even in such cases where the demand for protection is too vocal and an escape clause has to be used, international rules

can be improved so that the protection granted is temporary and designed to facilitate the adaptation to competition. Such an escape clause system would allow a combination of (i) the interests of society in forcing economic actors to adapt to competition and (ii) the legitimacy there is in decentralized political systems to reduce the pain of the adaptation.

An important improvement in the procedures of cooperation⁽²³⁵⁾ in trade matters is therefore the one dealing with the Escape Clause mechanism, creating an effective international procedure to control the use made of it. Having a set of norms and procedures to deal with high track demands for protectionism can allow to fulfill the final aim of the trading regime in the long run, since the end of such norms and procedures is only to provide time for adaptation. Without such a system, high track protectionism exists any way, but without the assurance that the final aim of the free trade regime, which is to allow competition to play its positive function at the international level, will be fulfilled, even if it is only in the long run.

(4) Practically, assuming that an equilibrium in the concessions made in the fields of trade, services, investment, etc... by states is possible, i.e. that a "deal" can be reached (which we will see below is the case), it would be possible to deal with existing high track protectionism during international negotiations leading to an international economic regime in the following manner. Most of the actual instances of

special protection should be converted into an escape clause procedure, the purpose of which would be to provide temporary "breathing room" for orderly adjustment, and not to provide a façade for indefinite protection.⁽²³⁶⁾ Centralizing relief under a refurbished escape clause with custom tailored adjustment plans would allow for the negotiation of an international "deal" on the basis of a reciprocal phasing-out of the existing instances of special protection. The only element in the negotiation would then be the time horizon for the elimination of each instance of special protection. The menu of regressive remedies used to ease the transition would be much the same as for new escape clause cases.⁽²³⁷⁾ In particular, existing quantitative restrictions could be converted into tariffs or auctioned quotas,⁽²³⁸⁾ which would be phased out according to a time-horizon depending on the existing level of tariff-equivalent protection.⁽²³⁹⁾

(5) International agreement on the use of the escape clause mechanism would ease its use by globally minded executive powers and therefore would decrease the need for the use of unfair trade laws.⁽²⁴⁰⁾ These could then be used to address the issues they are supposed to deal with : unfair business behaviour.⁽²⁴¹⁾

3.2.2.2 Low-Track Protectionism : the Non-Discrimination Principle

(1) Another interesting aspect of the solution of creating a free trade club is that it allows to find a solution to the problem of low-track non-tariff barriers. If the decision to build a free trade area is understood as a modification in the significance of the reciprocity principle, the new principle can be perceived as a commitment toward free trade and non-discrimination. We have seen what the anti-protectionism principle means in other more integrationist multi-state integrated economies : it is nothing more than the prevention of purposely protectionist measures. The change in the reciprocity principle at the global level means then nothing less than the possibility of the institutionalization of the rule of law in some types of trade disputes. Reciprocity in the old system could be "measured" only diplomatically. If reciprocity becomes a reciprocity of commitment toward nondiscrimination between nationals and foreigners, then it is possible for law to determine when the principle is breached or not.

Another way of eliminating many of the purposive non-tariff barriers than adopting central norms is to develop a procedural mechanism akin to the one existing in federal states to prevent state protectionism. The idea here is to save on the use of international diplomatic resources, and to make a greater use of national judicial resources and of private international

resources. We already know the principle to apply to prevent protectionist legislation : the principle of non-discrimination.⁽²⁴²⁾ Increasing its effectivity in international law through procedural developments would help economic integration. The principle of non-discrimination, which is diffused in the entire existing international integrationist regime, is now enforced by states : to improve its effectivity, there is need for another mode of enforcement.

(2) As we have seen, in the United States and the European Community,⁽²⁴³⁾ economic actors can make use of judicial resources to have unwarranted barriers removed by demonstrating that such barriers derive from discriminatory measures. They can go to courts which can declare such laws either "unconstitutional", in the United states, or in violation of the Founding Treaties of the European Community. They thus can maintain the integrationist regime open even when the evolution of society requests the adoption of new norms, which they can challenge when they do not fit within the set of supreme norms at the root of the integrationist regime. The issue is to find the type of procedural development needed for such an action of private economic actors to be possible at the global level.

(3) To maintain a free trade regime after its creation, use must be made of forces having an interest in such maintaining.⁽²⁴⁴⁾ Household consumers are obvious losers from trade protection.⁽²⁴⁵⁾ However, their failure to act to

defend their interest is a staple of political analysis : they face a severe collective action problem and, a good deal of them being also producers of goods, when they think about trade politics, they tend to worry more about their job than about the monopoly rents they pay to lousy producers. (246) But there are other forces having an interest in free trade which can be made use of. (247) For example, a recent study in the United states has shown that several primary groups contributed to a sharp increase in political resistance to product-specific trade protection between the mid-1970s and the mid-1980s. They were four types of special interests benefiting particularly from the trade threatened with protection : industrial users of imports, retailers of traded consumer goods, American exporters selling to the countries whose products were targeted, and the companies and government of those countries. (248)

The difficulty with these forces is to pull them together : (249) since they tend to defend special interests opposed to the special interests requesting protection, they lack a central political organization to speak for them, and their interest is not in "free trade" as much as in the specific product flow to which they are party. (250) However, in an existing regime, their presence is certainly useful to maintain the regime open.

But in addition to local consumers and special interests in favor of free trade, a very strong counterbalancing force to hidden protectionism in an existing system can also be found outside the nation/state whose protection is requested by a

firm or industry, in the competitors of the firm or industry requesting protection.⁽²⁵¹⁾ The constitutional change needed to counterweight protectionist demands must therefore give a voice to outside forces. This is why it can be said that there must be a constitutional change at the international level : an international agreement is needed to get the support of dynamic industries because they are outside the nation-state whose protection is sought by failing industries or companies ; but the agreement has to be based on a principle influencing on the whole domestic decision-making process, and this is why it can be said of a constitutional nature.

(4) Everybody agrees that the machinery for dispute settlement in GATT does not operate properly with regard to very important areas of trade relations, and that limited achievements in the settlement of disputes could not cover up such inadequacies.⁽²⁵²⁾ However, most of the proposals made to improve matters relate to small changes, small improvements in the existing diplomatic/bureaucratic way disputes are handled.⁽²⁵³⁾ Proposing small achievements is probably warranted for the dispute resolution process applying to GATT as a whole. For most of the GATT activity, the purpose of the general machinery of dispute resolution is not to ensure compliance with law, but to ensure a continuous "balance of advantages".⁽²⁵⁴⁾ The role of law here is mostly to put boundaries to the arguments available to the parties in order to circumscribe their dispute. The acceptance of the

"diplomat's technique as a medium of legal discourse"(255)

was necessary for an institution with potentially so wide a jurisdiction as that of GATT. This same argument justifies the warning by authors that there can not be any improvement in the procedures of dispute settlement without prior agreement on the rules to be applied :

"It is agreement on these rules which conditions agreement on the procedures for settlement and not the opposite. A stronger consensus on precise substantive rules make it possible to strengthen the machinery for supervision of their interpretation and application. But if there is no such consensus, a strengthening of the dispute-settlement procedures will provide no remedy. On the contrary, because the supervision procedures are applied to contested rules, the stricter they are, the more firmly they will be rejected. (...) Any reform of the procedure therefore presupposes prior agreement on the rules themselves."(256)

As far as low-track non-tariff barriers are concerned, the rule to apply - if Contracting Parties really want to face the issue - is simple : it consists in the direct applicability in national law of the non-discrimination principle. Bhagwati has very properly remarked that :

The need for institutional change that will give more play to the forces favoring free trade and will permit the costs of protection to weight more adequately in the deliberations than they now do is evident.(257)

The reader should recall that from the outset, the structural bias in favor of protectionism in the global-economy is a constitutional problem : international trade policy conflicts arise from domestic redistribution policies.(258)

International negotiations on the creation of a regime

preventing the recurrence of conflicts should try to articulate rules that will have a chance of reforming not just the conduct of trade policy, but also the domestic policies that determine that conduct.⁽²⁵⁹⁾ And because trade policy is not the only area where protectionist forces can make themselves felt, the rules or mechanisms designed should indeed influence the whole process of domestic norms creation. We have seen the constitutional role of states in answering the demands of their constituents, and in internalizing costs within the structure of decision-making of enterprises.⁽²⁶⁰⁾ This raises non-tariff barriers, some of them being unwarranted per se in an integrated but politically decentralized economy, because purposefully created. Enterprises affected can - in the United States and in the European Community - challenge these measures in courts, fulfilling a "functional constitutional role" - in the pursuit of their own "private" interest - in favor of the unification of the market, with all the implied benefits for the nation as a whole. For the same constitutional role to be played by multinational enterprises at the global level, "locus standi" has to be granted to them. The most efficient manner to achieve that objective would be to have the Free Trade Club Agreement directly applicable in state law, allowing everybody to invoke the Agreement in state courts.⁽²⁶¹⁾

(5) To effectively implement the non-discrimination principle at the global level, the reform needed is twice : (i) the respect for the principle of non-discrimination must be imposed on the whole national process of norm creation ; and (ii) the principle must be directly applicable in national law.

The fulfillment of the ideal of legality implies that the capacity to generate and sustain reasoned criticism of the rules and of official discretion must be built into the machinery of lawmaking and administration.⁽²⁶²⁾ We have shown that the nondiscrimination requirement is a cornerstone principle in GATT, two of its most important obligations - Most-Favored-Nation and National Treatment - deriving from it.⁽²⁶³⁾ However, as a rule of international public law with no direct effect on individual rights,⁽²⁶⁴⁾ it has not been able to prevent the world-wide rise in protectionism we have experienced over the last decades.⁽²⁶⁵⁾ Given the political dynamics of protectionism, it can not be stopped if the nondiscrimination principle in international law is not translated into a right to nondiscrimination under national law ; that is, a principle to which economic actors can make appeal directly in courts.

An effective implementation of the non-discrimination principle requires that private actors can invoke it against other states than their state of origin when they feel that they are discriminated against. This implementation requires that the principle of non-discrimination be made directly applicable in national law. With the reform we advocate, the Most-Favored-Nation principle and the National-Treatment Obligation - which are the two aspects of the nondiscrimination principle in GATT law - would merge in a unique principle of nondiscrimination to which private parties could appeal in courts.

While the nondiscrimination principle is a keystone to GATT, the existing structure of the GATT legal system is built to address issues of negative effect on trade of state measures which have as a result to "nullify or impair" the benefits of Contracting Parties in GATT.⁽²⁶⁶⁾ It is a sum of procedures of negotiation between states, the dispute resolution mechanism itself being barely distinguishable from the rest of the negotiation activity going on in GATT. It therefore does not function as a legally enforced principle, and those actors which are more directly interested in requesting its respect (private ones) can not invoke it in court.⁽²⁶⁷⁾ It is true that both the United States (with the Section 301 of the 1974 Trade Act)⁽²⁶⁸⁾ and the European Community (with the so-called "new commercial policy instrument")⁽²⁶⁹⁾ have adopted legislation allowing their constituents to launch procedures eventually leading to an enforcement of their state's international economic rights. These developments are interesting in the sense that they may be perceived as representing a trend toward the creation of procedures available to economic actors in connection with the application and enforcement of international economic rules.⁽²⁷⁰⁾ However, so far, they only allow an indirect mode of redressing discriminatory practices of other states, since their only role is to allow constituents to make their own state act against alleged violations of international economic law.⁽²⁷¹⁾

(6) For a good many years, there have been discussions on the creation of a "GATT-Plus", "GATT of the like-minded", or a "Super-GATT", searching for an additional joint pledge by which a group of core countries would make the GATT rules more strictly binding on themselves.⁽²⁷²⁾ In that way, their governments would be more effectively shielded from domestic demands for protection.⁽²⁷³⁾ The difficult problem has been to find what form the additional pledge should take.⁽²⁷⁴⁾ The proposal has been made to have GATT law enacted into domestic law to have it enforceable by private parties on governments.⁽²⁷⁵⁾ This solution is generally considered as impracticable and maybe inappropriate due to the inadequacy of GATT rules generally speaking. But this is not so for the non-discrimination principle. We thus propose at the core of a reform of the trading regime to have the principle of non-discrimination directly applicable in national law. This would permit economic actors to invoke it in national courts to request nullification of the effects of protectionist measures. This solution would be simple and flexible. With an appropriate transitory period to allow for the creation of the free trade area and the progressive removal of existing discriminatory measures, together with appropriate escape clauses, a treaty could be concluded between like-minded countries which, once ratified, would be national law with regards to the non-discrimination principle provided for and would, either directly or through implementation, constitute a private right invokable in court. This direct applicability is the

cornerstone of the reform : as we have seen, nondiscrimination is already an obligation for governments in GATT law.⁽²⁷⁶⁾ They do not respect it because the treaty has been ineffective in forcing them to do so, the reason for its ineffectiveness being that the treaty failed to provide a private recourse against non-compliance.⁽²⁷⁷⁾ The practical effect of this change would be to make of multinational enterprises - as the first actors interested, concerned and capable of mobilizing the juridical resources necessary - agents of the prevention of state protectionism without having to go through the complex and unreliable process of international negotiation among states. Among the many ways of using multinationals for industrial policy purposes at the global level, one is therefore to use them as actors against parochialism and the production of protectionism. Many types of utilization of multinational enterprises for industrial policy purposes would require difficult international agreement on substantive rules and principles. But here, the legal principle to apply is not a novelty for the two most important public players in the international economy. The United States and the European Community have a federal structure which juridical apparatus is accustomed to the interpretation of the principle of non-discrimination.

(7) At the international level, the ultimate objective of the rules is stability of the policy framework, which ensures that plans and activities of enterprises will not be disrupted,

that competition will be maintained, and that the international price system functions smoothly.⁽²⁷⁸⁾ The reform we advocate would reach that objective. Additionally, entrenching the principle of nondiscrimination would be an important step, at the national level, in domestic constitutional reconstruction.⁽²⁷⁹⁾ Successful rent seeking consisting in securing differentially favorable treatment by the state, protectionism is a form of internal discrimination. There is therefore not just a parallel between nondiscrimination internationally and equality before the law in the international context, but a functional relationship between the two : nondiscrimination in international trade is a safeguard for the equality of individuals before their own national law.⁽²⁸⁰⁾

(8) One must recall that the end of the reform proposed is to protect the functioning of liberal society, and in particular the principle that wealth will not be appropriated by the public system for the purpose of being redistributed to others without the agreement of representative assemblies and for legitimate purposes.⁽²⁸¹⁾ The purpose of the reform, thus, is not to give privileges to companies. But to protect the rights of individuals, a use of the corporate system is a necessity : when an enterprise or industry gets protection from competition, the competing enterprise(s) or industry(ies) has(have) an interest in having competition re-established. In order to allow them to fulfill the socially beneficial function

of having competition protected, they must have access to procedures reestablishing competition, allowing them to enforce the principle of non-discrimination.

(9) With regards to the procedural reform needed to allow micro-economic actors to screen discriminatory measures, develop arguments against them and have them removed by court decisions, it is obvious that the simpler the reform, the better. For the sake of discussion, one could imagine creating a central international court to deal with issues of discrimination. But the court would soon be overburdened, and become unable to reach to its task. A system of courts would thus be needed. However, the complexity of the organization of such a system would probably destroy any goodwill there may be in the world in favor of the reform. Additionally, creating international courts is very offensive to national sovereignty, and is a very difficult and unlikely step.

There is one simpler first move which can be made, which does not solve all issues but allows to launch a dynamic. We have seen the similarities there are in the case law of the American Supreme Court and of the European Court of Justice in cases dealing with these particular types of measures we aim at being suppressed. One simple way of providing for procedures for the effective implementation of the non-discrimination principle is to provide for its direct applicability in national law... and do nothing else. In the European Community, the additional commitment not to discriminate would be made by

the European Community, and would be directly applicable in the Member States. The European Court of Justice would be the supreme court in charge with the uniformization of the interpretation of the principle of non-discrimination over the territory of the European Community. In the United States, the commitment would be above other federal and state law, and would be interpreted by federal courts under the unifying interpretative role of the Supreme Court. Since there is a great similarity in the case law of the European Court of Justice and of the Supreme Court, there is little risk that their future case law on similar issues would greatly diverge. The international treaty could provide that both supreme courts, and the ones of other polities participating in the regime, should use the American and European case laws as a source of inspiration for their own decisions, if not as a mandatory source of law.⁽²⁸²⁾ In case divergent interpretations would develop, there would be at least two solutions : (i) create a court of appeals above the two supreme courts to resolve the differences, or (ii) adopt an interpretative treaty.

We now come to the end of our story. The Uruguay Round is almost dead and everyone is afraid of tomorrow, of trade wars, of a divided trade world. And fear there should be since we now know how much exchange - trade - and peace are connected. We will quickly explain what happened, in the hope that our theory may help to launch a new negotiation on different tracks, to escape the many specters of yesterday.

3.2.3 The Launching of a Self-Fulfilling Prophecy

(1) The world trading system enters a period of crisis, with a great danger to fall apart, and few are the ones who believe it can recover soon. Here again, the history of the European Community is an important source of inspiration.⁽²⁸³⁾ The parallel which can be drawn between the European Community integration and the institutional evolution of the GATT System is that a use of micro-economic forces was needed for progress in the European Community and this is what is needed to improve the global system. The evident difficulty at the global level is that there is no Commission to advertise on the global cost of protectionism, which has been an important element in the dynamic of the European integration. However, one could imagine that an "institution" such as the Group of the Seven More Industrialized Countries, or "G7", could play a similar role. A dynamic such as the one which led to the adoption of the Single Act⁽²⁸⁴⁾ could be developed if - after careful elaboration of the strategic concepts - a commitment would be made to create a new regime during one of the summits.⁽²⁸⁵⁾ An ad hoc comity with a role similar to the one played by the Commission with regards to the development and diffusion of the information regarding the costs of the non-Europe could be created to develop and publicize the costs of a divided world economic system, the possibility to save some of these costs by appropriate institutional reforms, the need for corporate political activism to counterbalance protectionist forces, etc...⁽²⁸⁶⁾

(2) As far as the feasibility of the reform is concerned, and with regards to the reason why the G7 may be the proper arena where to launch the creation of a new regime,⁽²⁸⁷⁾ our discussion on the creation of international public goods is to be recalled here.⁽²⁸⁸⁾ There is no need for an agreement between all trading countries for such a good to be created ; an agreement between the most important trading countries is sufficient. In 1985, twelve countries accounted for three-fourth of the world imports ;⁽²⁸⁹⁾ the European Economic Community, the United States, Japan and Canada (all the G7 countries) alone accounted for more than half.⁽²⁹⁰⁾ If transactions among this group of countries could come to be conducted according to settled rules, and other countries could trade with them on a Most-Favored-Nation basis, a sturdy international trade regime could be said to exist.⁽²⁹¹⁾

(3) The main obstacle to a successful completion of the Uruguay Round of GATT negotiations (so far) has been the impossibility for the United States and the European Community to agree on rules regarding agricultural products. The United States, who may have gone too far in their uncompromising attitude,⁽²⁹²⁾ have declared that they will not go along with the other reforms discussed during the talks if a solution is not found in the agricultural field. While the United States, or American consumers, spend about 75 billion US dollars a year on agricultural subsidization,⁽²⁹³⁾ and after decades of

agreement on the fact that agriculture should not be subject to the general GATT rules, the United States proposed in 1987 a complete elimination (over 10 years) of exports subsidies and of 75% reduction of internal subsidies. The European Community has not responded favorably and has proposed a reduction of 30% of the subsidies on all the main agricultural products, to be achieved over the next five years to 1995/1996. As far as the United States is concerned, the reduction in support proposed amounts in effect to an overall reduction of 10% in current support measures by 1996 and is unacceptable. Its latest position is that there should be a 70-75% reduction on internal support ; possibly a 90% cut in export subsidies ; a tariffication plan converting all non-tariff barriers in the agricultural sector into tariffs, incorporating tariff rate quotas to be progressively reduced and a 3% minimum access on imports currently prohibited.

(4) At first sight, the difference of attitude between the United States and the European Community is surprising : they both heavily subsidize their agriculture now ; for both, the amounts spent have reached unbearable levels requiring reform. How is it possible to explain why the United States absolutely want to reform their programs supporting agriculture while the European Community absolutely refuses to do so ? A fundamental explanation of this difference in attitude is that while the United States system is structured in such a manner that the price of the subsidization provided is paid by the taxpayer, so that there is internal political pressure to reform the system,

the European Community system is structured in such a manner that the price of support is mostly paid by consumers (who do not know what its amount is), and not by taxpayers. For this very reason, the European Community has not been able to dramatically reform the Common Agricultural Policy ("CAP") so far, because in the face of a strong resistance from farmers, it is not forced by the pressure of taxpayers to move ahead with a necessary reform. Only when the cost of the stocking of the surplusses reached such amounts that it started to be felt by taxpayers has the Community started reforming the system, in 1984. While it is necessary to come back to this simple but fundamental idea that farmers should, like anyone else, bear the consequences of their acts, as determined by the price system,⁽²⁹⁴⁾ and that any subsidization paid to them should come out of either national or Community budgets,⁽²⁹⁵⁾ the pressure to reform the CAP has to come from abroad since its very structure makes that it is paid by consumers who barely know how much they pay for it and therefore don't pressure politicians to reform it. If this would work, GATT would, as is logical in the light of the analysis we have made of its functions, allow to create a new regime of support to farmers more defensible within the framework of a liberal society. The issue, in effect, is not to let go any support to farmers. It is to structure such support in a manner that (i) this will be least harmful for the price system and that (ii) support will come from the public budgets, which would put political limits on the support provided. Redistribution policies, to be decided

in a politically sensible manner, must be priced, and only if support comes from taxes can Europeans decide how much they value traditional modes of organization of the country.

(5) Initially the goals of the CAP were clear : while the Community wanted to protect the family farm, it aimed at providing self-sufficiency in agricultural production to Europe. To this end, agriculture was isolated from the normal price effects of variations in supply and demand. Prices much higher than world prices were and are still today decided in Brussels and paid by consumers, while importers of farm products in the European Community have to pay variable levies having for effect to bring their prices to Community levels. Exporters of European Community farm products (who have to sell at world prices) receive from Brussels the difference between such prices and Community's prices. This system led to its desired effects : it generally increased productivity and production.⁽²⁹⁶⁾ However, since the Community must purchase on the "market" the farmers' production which can not find a buyer at Brussels' determined prices, stocks of farm products have reached absurd levels, at great expense for the European taxpayer who must pay for their keeping or export, at subsidized prices.⁽²⁹⁷⁾ Since 1984, the European Community has started to reform the CAP, in particular by imposing quotas on milk production and by reducing support prices. However, if the level of support has been globally reduced, there has been no structural reform. The problem the existing system creates at the international level, and which led to America's stance

in GATT, is that in order to get rid of surplusses, the European Community must subsidize their sale on third markets at heavily subsidized prices. This disrupts the export markets of third countries such as the United States, which then need to subsidize their own exports to remain competitive, while developing countries do not receive the appropriate market signals to develop their local agriculture, which development should be one of their priorities. (298)

The United States also subsidize its farmers, (299) but in a manner which is generally less disruptive of third markets. (300) Each year, a "target price" is fixed for farm products in the United States. Farmers request loans for the estimated value of their crop, which is determined using a floor price, the so-called "loan rate". If the market price obtained is higher than the "loan rate", the farmer reimburses the loan ; otherwise, the loan is kept, and ownership of the crop is transfered to the Commodity Credit Association which granted the loan. If the market price is lower than the "target price", the farmer gets the difference as a so-called "deficiency payment". With this system, prices on the American market are close to world prices, while farmers get in fact higher prices ("target prices"). The main differences with the PAC are that while the cost of the PAC is mostly paid by consumers, the cost of the American system is paid by taxpayers ; and that while deficiency payments are made for the whole of the farm production, the Community's policy is such that subsidies are paid in large part for the export of farm products only. (301)

(6) The opposition between the United States and the European Community therefore derives more from a problem of structure than from a fundamental opposition between a Free Trader and a Market disrupter. The CAP is structurally disturbing the international markets in agricultural products in a severe manner. Only if it is profoundly reformed can the problem be solved in the long run. But the PAC is amazingly difficult to reform for political reasons : farmers, in many European countries, such as France or Germany,⁽³⁰²⁾ have a political weight which is disproportionate to their relative importance.⁽³⁰³⁾

One possibility of reform, as we have already mentioned, lies at the international level.⁽³⁰⁴⁾ Even though linkage between the need to make progress at the GATT negotiations and the reform of the PAC contemplated by the so-called MacSharry plan⁽³⁰⁵⁾ has been denied,⁽³⁰⁶⁾ it has been made progressively,⁽³⁰⁷⁾ which is logical in our perspective. To reform an economic absurdity, when it is difficult to do at the internal level when one has to rely on one's own political strength to resist to the voice of entrenched interests,⁽³⁰⁸⁾ a solution is to use the external constitutional order. That's one of the functions of GATT.⁽³⁰⁹⁾ French and other European farmers are rightly perceived as blocking progress on GATT's negotiations.⁽³¹⁰⁾ The key is to use GATT to show to other domestic interests what they have to gain from a reform which is blocked by the sectional interest of farmers, to have them act at the political level to force entrenched interests to accept the deal.⁽³¹¹⁾

(7) The reform of the CAP is not the only issue holding the negotiations. Developing countries won't accept an extension of the scope of GATT to services and investment and reforms in fields such as the protection of intellectual property rights if, in addition to a reform in the agricultural sector,⁽³¹²⁾ the Multi-Fiber Agreement is not dismantled.⁽³¹³⁾ The MFA has been a scandal for years, since it is preventing development in the precise field where labor rich countries can start with limited capital and knowledge to produce exportable products, which allows them to progressively upgrade quality, invest in side sectors, etc...⁽³¹⁴⁾ The MFA has not only been a scandal, but another great absurdity : it is by developing capital poor countries that markets will be created for the products requiring more information and capital such as the ones produced by developed countries. The manufacture of these types of products commanding higher wages than that of low information/low capital products, this would allow to maintain the relatively high level of wages in developed countries. Finally, the MFA has costed consumers and the economy in general a bundle, since prices for clothing products have been artificially maintained at exceedingly high prices given what their cost would be if produced in the countries having a comparative advantage for such production.⁽³¹⁵⁾ Here also, we therefore find a combination of internal and of external constitutional problems, where more justice at the internal level of states can be achieved only by international reform.

(8) In the same manner that the industry has been mobilized to reform the European Community structures when they proved to be unable to raise to their task, what must be made, and which has barely been made so far, is to mobilize the multinational industry and service forces having an interest in the reform. By batching issues, a new global deal is possible where enough advantages would be derived in each of the United States, the European Community and Japan that dynamic forces would be able to counterbalance protectionist forces.⁽³¹⁶⁾ Our point is that there is a basis to harness the forces needed to develop a new deal.

CONCLUSION

(1) We have developed an approach explaining the development of international economic integration as a process of legal integration. Our thesis is that the symbiotic relationship between the development of micro-economic networks of exchange relationships and public institutions creates a dynamic which demands centralization in the provision of some norms or public functions, while other norms or public services can remain decentralized. The needed decentralization of sovereignty creates pressure for the institutionalization of a cooperative legal system preventing the competitive game among state sovereigns to turn sour by making sure that any national legislation is adopted in a non-discriminatory manner.

Federalism has provided us with a very powerful model which allowed us to go in some depth in the analysis of a system of exercise of power composed of several territorial layers and in which functional organizations, private or public, play an instrumental role in the equilibrium of the system.

At the territorial level, it is thus possible to imagine the world of tomorrow composed of four layers : regions within states ; states ; regional organizations of states ; global organizations. While states are the only organizations having

potentially the power to regulate all aspects of social life, all other organizations have functional jurisdictions. Private organizations, in this perspective, can even be included in the analysis of federalism. They share in the division of power, and can have a dramatic impact on the equilibrium of power among territorial organizations holding public power.

(2) Some concluding remarks must be made with regards to the potential existing for a new deal which we have mentioned in the last part of our book.

(a) The validity of our analysis depends on a prerequisite which is that People in the world want to live in a liberal system. It is a bold prerequisite since one has to acknowledge that most of the world of today does not function as a liberal system. This is true both within countries and at the international level.

With regards to countries which used to have centrally planned economies, they have started a historical process of internal reforms which allows one to imagine that an interfacing in international liberal institutions may be possible in a not too distant future. The same conclusion, however, may not be made for many of the countries in the so-called third world.

(b) At the international level, one encouraging development for the development of the rule of law is the fact that the United Nations' system of collective use of force has finally began to be used in the Gulf conflict. The objective of this

system - i.e. the enforcement of international law to maintain peace and order - corresponds to one of the rationales for the creation of world organizations : the creation of physical order. It has been possible because of the recent internal changes which occurred in Eastern countries, and especially in the Soviet Union, where a dramatic ideological shift has allowed more unity of action among the Northern states.

There are two other rationales for the creation of institutions necessary for order to appear in the international economy, and their presence is overwhelming in today's global-economy : (i) many public goods have to be internationally provided; and (ii) the prevention of many negative externalities created by the existence of world-wide markets requires international action.

One example is particularly suited to our case because it shows how all the issues of economic order, market externalities, public goods, economic development, economic regulation, comparative advantage, market for states, etc... are systemically linked : the prevention of certain types of pollution. In many of its consequences (global heating, ocean pollution, etc...), pollution is obviously a world issue. The need for international action is already clear today ; but it will become even more so if third world countries attempt to develop their economies by using the cheapest energetic resources available (as they logically must and will do). Simultaneously, it is more than unlikely that third world countries would agree to give up such a cost advantage - which

they could use for their economic development - if they are not subsidized to do so. Such subsidization - which would be in effect an international political decision for the benefit of all to preserve a global common - would require united institutional action by developed countries, and therefore the need for one or several international organization(s) to develop international norms to fight pollution and to subsidize by voluntary contributions and/or taxation those bearing a share of the cost of the adoption of such norms which is too heavy for them.

The ecologically sound development of most of the Southern hemisphere can therefore be seen as the next frontier. The existence of international economic institutions would facilitate the task of helping the economic development of these countries. And this task has become urgent, for humanitarian reasons, but also due to the demographic imbalance between North and South : it will be impossible to keep impoverished human masses knocking at the doors of our mountains of wealth for very long. But where can we find the impetus to create the dramatically new institutions needed ?

(c) The Northern world would have to take the lead in the creation of the required international organizations if anything is to be done. However, even among the Northern countries, there are wide ideological differences making it difficult to agree on common principles, as has been shown in agriculture during the Uruguay Round of GATT negotiations.

Simultaneously though, the results achieved in other fields have shown that differences can progressively be resolved, especially if a sensible use of private corporate forces is made.

Three major problems remain to create and keep the leadership of divided Northern countries : (i) the ideological differences among the United States and the EEC; (ii) the incredible complexity and unpredictable nature of the political decision-making process in the United States, but also in the European Community; and (iii) the fact that Japan's system barely functions according to the liberal model.

These difficulties make that it is possible to imagine one scenario for the world of tomorrow. It would consist in the consolidation of three zones, each with its clientele of developing countries. This system would be unstable and would make it very difficult to adopt global policies.

Another possibility is a world composed of two zones, two of the three previous zones combining against the third. The best of such combinations for a progressive development of global world order would be, on a transitional basis, US/EEC v. Japan, because it is difficult to imagine that Japan, due to its reliance on international markets, could stay outside an organization with so much structural power to influence world markets for very long. This fact explains why we have concentrated our comparative analysis on the United States and Europe : it is primarily among them that a deal has to be made.

We think our scheme of analysis is a way to understand and explain the development of an international liberal economy. However, the history of worldly events remains unpredictable. In other words, if we are convinced that the principles we exposed will apply in case international liberal organizations are institutionalized, there is no certainty that this will actually happen. In final analysis, if it is true that unity is rarely created in favor of something, but more commonly out of the fear of something else, the challenge posed by the developing world may be the engine for global institutionalization, since it provides issues for globally minded politicians and opportunities of growth for multinational companies.

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ENDNOTES

PART I

1. Fernand Braudel and Immanuel Wallerstein are key to the understanding of the meaning with which I use the concept of world-economy. For Braudel,

"L'économie monde ne met en cause qu'un fragment de l'univers, un morceau de la planète économiquement autonome, capable pour l'essentiel de se suffire à lui-même et auquel ses liaisons et ses échanges intérieurs confèrent une certaine unité organique. (at 12) (...) Pas d'économie-monde sans un espace propre et signifiant à plusieurs titres : il a des limites, et la ligne qui le cerne lui donne un sens comme les rivages expliquent la mer ; il implique un centre au bénéfice d'une ville et d'un capitalisme dominant déjà, quelle que soit sa forme. La multiplication des centres représente soit une forme de jeunesse, soit une forme de degenerescence ou de mutation. Hiérarchisé, cet espace est une somme d'économies particulières, pauvres les unes, modestes les autres, une seule étant relativement riche en son centre. Il en résulte des inégalités, des différences de voltage par quoi s'assure le fonctionnement de l'ensemble. (...) Les limites d'une économie-monde se situent là où commence une autre économie du même type, au long d'une ligne, ou mieux d'une zone que, d'un côté comme de l'autre, il n'y a avantage, économiquement parlant, à franchir que dans des cas exeptionnels. (at 16) (...) Toute économie-monde est un emboîtement, une juxtaposition de zones liées ensemble, mais à des niveaux différents. Sur le terrain, trois "aires", trois catégories au moins, se dessinent : un centre étroit, des régions secondes assez développées, pour finir d'énormes marges extérieures. Et obligatoirement les qualités et caractéristiques de la société, de l'économie, de la technique, de la culture, de l'ordre politique changent selon qu'on se déplace d'une zone à l'autre. Nous tenons là une explication à très large portée, celle sur laquelle Immanuel Wallerstein a construit tout son ouvrage, The Modern World System" (1974)." see in Civilisation matérielle, économie et capitalisme, XVème-XVIIIème siècles, tome 3, "Le temps du monde", A. Colin (1979), at 12, 16 & 28.

Today, for the first time in history, there is one global world-economy, since the world-economy which used to be centered on the Soviet Union is almost completely disintegrated. Its elements are slowly integrated in the Western world-economy. The change occurred mostly due to the incapacity of the Eastern world-economy to innovate, and to its increasing need for technologies and products produced in the Western world-economy. The new global world-economy is still institutionally very unstable, but the hierarchy typical of the structuring of any world-economy is visible. Notably, if the core and the center of the world-economy are witnessing a uniformization of the products and services offered in them, and an internationalization of firms which need to compete on each local market to remain competitive, many national economies are still left at the periphery of the world-economy. Their economies are not as intertwined with those of other countries as is the case for the economies of developed countries at the center and core of the world-economy ; and their firms and competitive conditions remain largely local.

2. See generally, Note, Developments in the Law - International Environmental Law, 104 Harv. L. Rev. 1484 (1991) [hereinafter the "Note"].
3. Keohane notes that "[world politics] is anarchic in the sense that it lacks an authoritative government that can enact and enforce rules of behaviour", in After Hegemony, Princeton, Princeton University Press (1984), at 7. However, as noticed by Keohane himself, the creation of an authoritative government above states is not the only solution to eliminate the state of anarchia of the international society ; institutions created by cooperation among states may very well change states behavior for the reason that the commitments made to support such institutions can only be broken at a cost to reputation, and that international regime therefore change the calculations of advantage that governments make ; see e.g., id. at 26.
4. According to Susan Strange, "the concept of structural power (...) consists in the ability of A to determine the way in which basic social needs are provided." She distinguishes structural power from relational power, which consists in the ability of A to get B by coercion or persuasion to do what B would not otherwise do. In comparison, while relational power is a lever, structural power is a framework : "The target of relational power, if it should decide not to do what is required of it by A, has to suffer the consequences determined by the other. For the target or object of structural power, the price of resistance is determined more by the system than by any other political authority" ; in Toward a Theory of

Transnational Empire, at 165. Structural power can be defined as "the power to shape and determine the structures of the global political economy within which other states, their political institutions, their economic enterprises and (not least) their scientists and other professional people have to operate." in States and Markets, Pinter Publishers, London, 1988, at 24-25. Susan Strange's main thesis in her 1989 article, with which I concur, is that structural power is more important to an understanding of the international system than relational power (see at 164), and that

"although there is disorder in the world economy and some disintegration of "regimes" so-called, the reason for this is not to be found in the decline of U.S. power. Rather, the explanation lies in the misuse of American hegemonic power in a unilateralist manner and in pursuit of national interests far too narrowly and shortsightedly conceived. Asymmetric structural power has allowed the United States to break the rules with impunity and to pass the consequent risks and pains of adjustment onto others. This has damaged the stability and prosperity of the whole world economy and has not been in the long-term best interests of the United States itself" ; see at 165.

The incapacity of the United States to appropriately use its structural power, probably due to its internal political system makes it a necessity to bind it within the framework of an international cooperative regime, to which it will agree only if enough structural power is concentrated in competing institutions with which agreement will then be necessary. I contend that one of the main point in concentrating structural power in the European Community is to create such an institution, with which the United States will need to cooperate to keep open the markets for its multinationals ; see infra, Part III, §3.2.3. On the problem posed by Japan, see id.

5. According to the theory of hegemonic stability, order in world politics is typically created by a single dominant power, and the maintenance of order requires continued hegemony ; e.g. Keohane, supra, note 3, at 31 ; thus, for Gilpin, it is " the Pax Britannica and Pax Americana, like the Pax Romana [which] ensured an international system of relative peace and security. Great Britain and the United States created and enforced the rules of a liberal international economic order" ; see in War and Change in World Politics, Cambridge, Cambridge University Press (1981), at 144.
6. E.g. The Economist's, December 22, 1990 ; The Economist's reminds that France's president Mitterrand discovered this in 1981-1983, when the market forced him to reverse

the socialist economic policies that his government had been elected to carry out ; id. Keohane notes in this context that international openness makes it difficult to undertake changes in policy that are at odds with the policies of the major states in the world political economy ; id. at 119 ; he cites an 1983 OECD report [...] according to which "international linkages, real and financial, work powerfully to limit the degree of divergence that is possible for individual countries." id. It is only after this episode that France became so pro-european, and led the way for an increased integration of the European Economy, the European institutions being the only level where France can have a significant impact on the evolution of the economy. Hence, it is recognized that the first two years of the French socialist government proved crucial in turning France away from the quest for economic autonomy : after 1983, Mitterrand embraced a more market oriented approach and became a vigorous advocate of increased european integration ; e.g. Sandholtz & Zysman, Recasting the European Bargain, draft, at 23. If the existence of international linkages reduces the degree of divergence that is possible for a given country, the need to increase international linkages (to participate in the world division of labor and reap its benefits) makes it difficult to choose autonomy vs. economic well-being ; see infra, Part III, §3.1.1.

7. The Gulf war has been the occasion of an increased cooperation among states, which has given rise to increased expectations of seeing the international society functioning pursuant to the rule of law. According to Mr. Paul Trần Văn-Thinh, who is the European Community's permanent representative to GATT in Geneva, "Sur le plan de la géo-politique, la guerre du Golfe laisse présager le développement de la construction d'un monde, non seulement interdépendant, mais également solidaire, et surtout fondé sur le droit." in 12 European Clothing Newsletter 1 (1991), at 2.
8. Ehrlich defines society as "the sum total of human associations that have mutual relations with one another" ; in Fundamental Principles of the Sociology of Law, Arno Press, New York (1975, 1st edition 1913), at 26.
9. For DeAnne Julius, the surge of foreign direct investments is contributing to fundamental changes in the structure of the world economy. See Global companies and public policy : the growing challenge of foreign direct investment, Royal Institute of International Affairs/Pinter publishers (1991).
10. For Hayek, competition is a corner stone of a free society because of the dispersion of knowledge and the role of competition as a discovery procedure :

"Competition is ... first and foremost a discovery procedure. (...) [The] issue is how we can best assist the optimum utilization of the knowledge, skills and opportunities to acquire knowledge, that are dispersed among hundreds of thousand of people, but given to nobody in their entirety. Competition must be seen as a process in which people acquire and communicate knowledge. (...)

Competition is not merely the only method which we know for utilizing the knowledge and skills that other people may possess, but it is also the method by which we all have been led to acquire much of the knowledge and skills we do possess. (...) ... rational behaviour is not a premise of economic theory, though it is often presented as such. The basic contention of theory is rather that competition will make it necessary for people to act rationally in order to maintain themselves. ... it will in general be through competition that a few relatively more rational individuals will make it necessary for the rest to emulate them in order to prevail. In a society in which rational behaviour confers an advantage on the individual, rational method will progressively be developed and be spread by imitation. It is no use being more rational than the rest if one is not allowed to derive benefits from being so. (...) No society which has not first developed a commercial group within which the improvement of the tools of thought has brought advantage to the individual has ever gained the capacity of systematic rational thinking." In F.A. Hayek, Law, Legislation and Liberty, Vol. 3, "The Political Order of a Free People", London, Routledge & Kegan Paul (1979) at 68, 75-76.

11. For a description of the now extinct United States-Japan voluntary restraint agreement on cars, see infra, note 379 ; for a description of the recent European Community Japan voluntary restraint agreement on cars, see infra, Part III, §3.2.2.1 (2).

12. P. Salin defines protectionism as :

"... l'ensemble des mesures d'origine étatique qui consistent à limiter, à interdire, à contrôler ou à influencer les échanges internationaux. Le protectionisme est donc le résultat d'un pouvoir de contrainte publique qui vient interférer dans le processus d'échange fondé sur la libre volonté de ceux qui sont directement concernés par ces échanges." in Libre échange et protectionisme, P.U.F, Paris (1991), at 3.

13. As we will see in more details later, in a liberal perspective, protection from competition should be provided either (i) to protect a legitimate interest of the liberal society, protection from competition not being one of such types of interests, see generally Part II, §2.2, or (ii) to provide temporary breathing room to facilitate structural adjustment to international competition, see infra, Part III, §3.2.2.1 (3).
14. Even though the rise of "green products" shows that competitive advantage can be obtained by non-polluting producers over polluting ones if they appropriately advertise the origin of their higher costs, allowing consumers to buy a cleaner environment when buying a product.
15. The report drafted by the International Monetary Fund, the World Bank, the Organization for Economic Co-operation and Development and the European Bank for Reconstruction and Development, entitled The Economy of the USSR - Summary and Recommendations, The World Bank, Washington, D.C. (1990) [hereinafter the "Report"], prepared at the request of the G7 meeting in Houston of July, 1990, remarks that "... there is no example of a successful modern centrally planned economy", at 1.
16. The Report, id., remarks that :

"Environmental concerns cut across all sectors. Many of the industrial and agricultural regions of the USSR are on the verge of ecological breakdown, posing an imminent threat to the health of present and future generations. Environmental and health risks in some regions are up 10 to 100 times greater than those accepted in most OECD countries. Severe ecological conditions affect 16 percent of the total land area." see at 37.
17. According to President Gorbachev's presidential guidelines "for the Stabilization of the Economy and Transition to a Market Economy" of October 19, 1990 :

"The position of the economy continues to deteriorate. The volume of production is declining. Economic links are being broken. Separatism is on the increase. The consumer markets is in dire straits. The budget deficit and the solvency of the government are now at critical levels. Antisocial behavior and crime are increasing. People are finding life more and more difficult and are losing their interest in work and their belief in the future. The economy is in very great danger. The old administrative system of management has been destroyed, but the impetus to work under a market system is lacking. Energetic measures must be taken, with the consent of the public, to stabilize the situation and to accelerate progress towards a market economy." See id. at 11.

18. The Economist's, April 20, 1991.
19. According to The Economist's, world economic integration has been speeded up by growth in trade in goods and services, which amounted to some \$4 trillion in 1990 (up 13 fold in real terms since 1950), financial flows and the migration of people and companies ; The Economist's, December 22, 1990, at 4.
20. R. Kuttner recently remarked that the American contempt for government is harming American free enterprise ; e.g. Bus. Week, June 3, 1991, at 11. He denounced, for example, the incapacity of America, "trusting the market, fearing government," to be able, like "other advanced industrial nations [to] make up for the failure of the private market to adequately invest in human capital" ; id. He concluded that "this cheap libertarian streak in the national character weakens our ability to use government as an instrument for common purpose" ; id.
21. In general, the term "externality" is used to refer to a cost (negative externality) or a benefit (positive externality) involving "secondary" effects felt by third parties to which producers would not attend except under regulatory incentives or controls - effects such as pollution, noise, job experience, or safer neighborhoods. See, for example, R.R. Nelson. & S.G. Winter, An Evolutionary Theory of Economic Change, The Belknap Press of Harvard University Press, Cambridge, Mass. (1982), at 367.
22. See generally M. Beaud, Le système national mondial hiérarchisé, Paris, AGALMA, La découverte (1987).
23. Id. at 9.
24. Id.
25. Id. at 9-10.
26. Id. See Madeuf, Du paradoxe à l'auto-organisation: pour une nouvelle approche de l'économie mondiale, 9 The Review 573 (1986).
27. According to Beaud,

 "... la réalité économique a été profondément bouleversée depuis trois décennies : intensification des relations économiques et financières internationales ; multinationalisation des grandes firmes productrices, mais aussi des banques et organismes financiers ; apparition et rapide développement de nouvelles marchandises immatérielles

ayant à voir avec l'information, l'informatique, les télécommunications et la décision ; nouvelle logique de conception et de production de marchandises, conçues en même temps dans leur globalité, pour l'ensemble du monde, et dans leurs spécificités, pour chaque partie et chaque pays ; et plus récemment, brusque gonflement des flux internationaux (crédits, placements, financements, spéculations, ...). In Beaud, supra, note 22, at 34-35.

28. Strange, The Global Political Economy, 1959-1984, 34 Int'l J. 267 (1984), at 273 ; see also Miller, The Global Corporation and American Constitutionalism : Some Political Consequences of Economic Power, J. Int'l L. & Econ. 235 (1972), at 237, who was first in understanding that the internationalization of production has dramatic constitutional law consequences. See infra, Part III, §3.1.2.2.
29. The existence of multinational firms has been variously interpreted as an instrument of colonial exploitation and as an efficient vehicle for the economic development of the Third World ; see e.g. Teece, The Multinational Enterprise : Market Failure and Market Power Considerations, 22 Sloan Mngt Rev. 3 (1981), at 3. The debate, which used to be highly charged with political overtones, has cooled off a little bit. Transaction cost economists may have a point when they say that a distinctive attribute of the firm is that it is an organization which possesses knowledge and skills, and that perhaps the most efficiency property of the multinational firm is that it is an organizational mode capable of transferring this knowledge and skills abroad in a relatively efficient fashion ; see, e.g., id., at 7.
30. R. Gilpin, The Political Economy of International Relations, Princeton, Princeton U. Press (1987) at 254. In the last three years of the 1980s, the flow of direct foreign investment measured in 1980 dollars was more than \$ 100 billion a year, ten times as much as it had been in the first three years of the 1970s (again in 1980 dollars) ; The Economist's, December 22, 1990, at 74. Between 1983 and 1988, foreign direct investments worldwide rose by more than 20% annually, four times faster than world trade ; see DeAnne Julius, supra, note 9. Once installed, foreign direct investments dramatically change the way economic calculations are usually made, assuming that national economies correspond to national territories ; hence, by the book, the American trade deficit was \$ 144 billion in 1986. But if one takes into account the activities of American-owned firms abroad and foreign owned firms in America, this huge deficit becomes a surplus of \$ 57 billion ; id. at 81. The Economist's rightly concludes that an "ownership"

measure of American trade raises basic questions about how international transactions should be thought of ; id. DeAnne Julius' conclusion is that "economic growth and integration will be enhanced by demoting the role of the exchange rate and the current account balance in international policy discussions and promoting the importance of agreed rules for trade, investment and competition in one another's market." at 13.

31. Id. This form of trade accounts for approximately sixty percent of all American imports ; id. On the export side, approximately half of the American exports involve multinational enterprises, with a quarter consisting of intra-corporate transactions ; see, for example, McCulloch & Owen, "Linking negotiations on Trade and Foreign Direct Investment", in The Multinational Corporation in the 1980s, M.I.T. Press (C.P. Kindleberger & D.B. Audretsch, eds. 1983), at 343. A problem to be mentioned here as far as such measurements are concerned is the one of the definition of what are the boundaries of the "firm".
32. According to Beaud, the 200 largest firms in the world represent 30% of the Gross World Product, and 50% of world commerce ; see supra, note 22, at 121.
33. In Keohane, supra, note 3, Keohane advocates a systemic analysis of international politics focusing the analysis of international cooperation and regimes principally on states ; see at 26. He rightly remarked that wealth and power are sought by a variety of actors in world politics, including nonstate organizations such as multinational business corporations ; however, he concluded that "states are crucial actors, not only seeking wealth and power directly, but striving to construct frameworks of rules and practices that will enable them to secure these objectives, among others, in the future ; id. There is some irony in a lawyer insisting that multinational business corporations should not be left out of the analysis of the international economic regime, but as the developments of this book will demonstrate, I think it is a great mistake to leave them out of the picture. A major reason for this is that it tends to increase the reification of states : states appear as objectified autonomous actors, while their internal institutions are in fact subject to the pressures and influence of corporate actors, national or multinational. As remarked in the Note, supra, note 2, "States, like corporations are legal fictions, composed only of organized group of individuals. International law traditionally has treated states as "black boxes" and has been unconcerned with their internal structures." at 1575. Even though states and firms should be treated differently due to their distinctive characteristics (in

particular, states are the only organizations in charge with managing a territory and the whole population located on it), states and firms should be included in a single systemic analysis, simply because the type of problems faced in today's progressively integrated society make that one can not rest on the surface of the "black boxes". Keohane is right in advocating a systemic analysis ; but the very reason he gives in favor of such analysis requires to develop the analysis at a deeper level than the one of states. Concentrating on states, keohane notices, with Waltz, that state behavior can be studied from the "inside-out" or from the "outside-in" ; id. at 25 "Inside-out", or unit-level, explanations locate the sources of behavior within the actor - for instance in a country's political or economic system, the attributes of its leaders, or its domestic political culture. "Outside-in", or systemic, explanations account for state behavior on the basis of attributes of the system as a whole. The distinctive characteristics of actors as well as of the system itself must be taken into account, but a systemic theory regards these internal attributes as constraints rather than as variables. The variables of a systemic theory are situational : they refer to the location of each actor relative to others ; id. It is an error to theorize at the unit level without first reflecting on the effects of the international system as a whole, for two principal reasons ; id. First, causal analysis is difficult at the unit level because of the apparent importance of idiosyncratic factors, ranging from the personality of a leader to the peculiarities of a given country's institutions ; id. Second, analyzing states behavior from "inside-out" alone leads observers to ignore the context of actions : the pressures exerted on all states by the competition among them ; id. Without prior systemic theory, unit level analysis of world politics floats in an empirical and conceptual vacuum ; id. at 26. The study of international economic regimes can not disregard the role played by firms in states' competitive game, precisely for the reason that if competition among states must be somewhat canalyzed by the rules of an effective regime (see supra, note 3), it is because of the internationalization of competition among firms. The very mechanisms and functioning of such competition at the micro-economic level must be understood to develop appropriate rules at the state level.

Attempting to define the notion of espace-marchand, P. Dockès distinguishes "l'espace abstrait comme champ de forces de l'espace matérialisé" ; L'espace marchand et les économistes des XVIIème et XVIIIème siècles, E.U.I. colloquium Papers, DOC. IUE 330/88 (Coll. 79)(1988), at 3. S'agissant de l'espace abstrait, "toute localisation produit un certain champ de forces dont l'inscription

spatiale n'est pas immédiatement matérielle", constitué de signaux-prix et de signaux quantités ; id. Mais "il est clair que ces signaux se font ou se déplacent à travers des réseaux qui, d'une façon ou d'une autre, s'incarnent matériellement ou sont distordus par les réseaux matériels (routes, voies d'eau, divers cablages, émetteurs-récepteurs d'ondes, ...). D'autres part, ces champs de forces ont des conséquences spatiales matérielles : localisation des entreprises, des productions, déplacement des hommes, des choses, des capitaux. L'espace abstrait, en utilisant des réseaux diversement matérialisés, structure les espaces matérialisés et ceux-ci transforment les champs de forces ou espaces abstraits. L'espace marchand est donc analysable soit comme espace abstrait (l'espace des prix ou des signaux quantités), soit comme un espace matérialisé (localisation des entreprises, des marchés, déplacement des marchands, des biens, des capitaux dans des réseaux matérialisés)" ; id. at 4.

35. Dockès notes that "Les moyens de communication se développent en grande partie grace aux relations commerciales. Mais ces dernières ne sont possibles que lorsqu'il existe des routes, des voies navigables et que la mer ne se présente pas comme un obstacle, mais comme un lien." in P. Dockès, L'espace dans la pensée économique du XVIème au XVIIIème siècle, Flammarion, Paris (1969), at 23.
36. In The Visible Hand. The Managerial Revolution in American Business, Cambridge, Mass. (1977), A.D. Chandler, Jr. concludes that the spread of the factory system depended on the "reliability and spread of the new communication and transportation. Without a steady, all-weather flow of goods into and out of their establishments, manufacturers would have had difficulty in maintaining a permanent working-force, and in keeping their expensive machinery and equipment operating profitably." see at 245. Similarly, Williamson notes that "the incentive to integrate forward from manufacturing into distribution would have been much less without the low-cost, reliable, all weather transportation afforded by the railroad" ; in The Modern Corporation : Origins, Evolutions, Attributes, XIC J. Eco. Lit. 1537 (1981), at 1551. Additionally, Williamson notices that "forward integration by manufacturers into distribution was one of the significant consequences of the appearance of the railroads. Low cost transportation combined with the telegraph and telephone communication permitted manufacturers efficiently to service a larger market and, as a consequence, realize greater economies of scale in production ;" id. at 1553. On the general influence of the expansion of physical networks of communication and transportation on the expansion of the espace-marchand, as espace structuré par la marchandise, see generally Dockès, supra, note 34.

37. According to Chandler, *id.*, the rise of the modern business enterprise between 1840 and World War I was "the organizational response to fundamental changes in processes of production and distribution made possible by the availability of new sources of energy and by the increasing application of scientific knowledge to industrial technology" ; *see* at 376. He insists that "far more economies result from the central coordination of flows through the process of production than from increasing the size of producing or distributing units" ; *id.* at 490.
38. According to Williamson, the most significant organizational innovation of the XXth century was the development in the 1920s of the multidivisional (or M-form) structure of management ; *supra*, note 36 at 1555. The M-form structure involved the creation of semi-autonomous operating divisions (mainly profit-centers) organized along product, brand or geographic lines. The operating affairs of each were managed separately, a general office, consisting of a number of powerful general executives and large advisory and financial staffs, monitoring divisional performance, allocating resources among divisions, and engaging in strategic planning ; *id.* at 1556. The domestic M-form strategy for decomposing complex business structures into semi-autonomous operating units was subsequently applied to the management of foreign subsidiaries ; *id.* at 1561. According to Williamson, "the adoption of a "global" strategy or "worldwide perspective" - whereby strategic planning and major policy decisions" are made in the central office of the enterprise - could only be accomplished within a multidivisional framework ; *id.*
39. To give an idea of the pace of the expansion of multinationals, while world trade volume grew at a compound annual rate of 5% between 1983 and 1988, global foreign direct investment increased by over 20% per annum in real terms over that period. *e.g.* DeAnne Julius, *supra*, note 9, at 14.
40. To realize the importance of common norms for traders, one can remember, for example, the obstacles to trade which existed in the old France. P. Dockès remarks that, in the XVIth and XVIIth centuries :

"Divisé par la langue, le royaume de France l'était également par des règles juridiques diverses. Au nord de la Loire étaient les pays de coutume, au sud les pays de droit romain. En outre, chaque province du nord et du centre avait sa propre coutume et à l'intérieur de ces provinces subsistait une multitude de coutumes locales. ...

Obstacle plus sérieux au commerce et qui durera malgré de nombreuses tentatives de réforme jusqu'à la Révolution, la variété des poids et mesures. Chaque seigneurie, chaque ville avait son propre système et à chaque type de marchandises correspondaient des unités particulières. En outre, une même mesure portait souvent des noms différents selon les régions et une même appellation recouvrait diverses réalités." in Dockès, supra, note 35, at 42.

41. Society implies rules and vice versa ; but why do we need society in the first place? Looking for an explanation of "Why collective action ? why the need for having society, or at least for having it play significant economic roles ?", Kenneth J. Arrow gives the following answer :

"... it is clear that interpersonal relationships are needed as part of our collective organization, for our mutual improvement, (...) for at least two reasons (...). One is simply that the basic resources of the society, its natural resources, its technological resources, are limited in supply, and the realization of alternative values or the attempts to find alternative activities for meeting those values imply a competition for these scarce resources. If we do things one way, we cannot do them another way. So we need to have a system which will mediate this competition, whether it be a market or an authoritative allocation system, as in the military or in the socialist state. We need, in any case, a social system of some complexity and of some considerable degree of organization in order to regulate the competition for resources, to allocate them along the different possible uses.

Further, interpersonal organization is needed to secure the gains that can accrue from cooperation. The essential considerations are two : (1) individuals are different and in particular have different talents, (2) individuals' efficiency in the performance of social tasks usually improves with specialization. We need cooperation to achieve specialization of function. This involves all the elements of trade and the division of labor. The blacksmith in the primitive village is not expected to eat horseshoes ; he specializes in making horseshoes, the farmer supplies him with grain in exchange, and both (this is the critical point) can be made better off." (see The Limits of Organization, New York, WW Norton & Co. (1974), at 16 & 18-19, emphasis added)

42. Pirenne notes that with the rise of commerce in Europe from the XIth century onwards,

"[Merchants] needed a simpler legal system, more expeditious and more equitable. At the fairs and markets they elaborated among themselves a commercial code (jus mercatorum) of which oldest traces may be noted by the beginning of the eleventh century. (...) ... it was a collection of usages born of business experience and which spread from place to place commensurately with the spread of trade itself. The great fairs (...) had a special tribunal charged with the rendering of speedy justice, must have seen from the very first the elaboration of a sort of commercial jurisprudence, the same everywhere despite the differences in country, language and national laws." In H. Pirenne, Medieval Cities : Their Origins and the Revival of Trade, Princeton, Princeton U. Press (1925), at 128-129.

Today, a new lex mercatoria is developed by the international business community which, having activities spreading over numerous jurisdictions, needs a simpler system of resolving contractual, procedural and other issues than that which can be afforded by a decentralized state-system unable to fulfill part of its facilitative function in an efficient manner. According to Goldman,

"[Les relations commerciales internationales] paraissent échapper à l'emprise d'un droit étatique, voire d'un droit uniforme intégré dans la législation des Etats qui y ont adhéré, pour être aménagées et gouvernées selon des normes d'origine professionnelles, ou des règles coutumières et des principes que des sentences arbitrales révèlent, à moins qu'elles ne les élaborent." in B. Goldman, Frontières du droit et lex mercatoria, 1964 Archives de philosophie du droit 177, at 177.

43. On this issue also, we can read Dockès :

"Aux XVI^e et XVII^e siècles, le royaume de France était encore divisé en un certain nombre de territoires parlant des langues différentes. Une coupure particulièrement nette séparait les pays de langue d'oïl de ceux de langue d'oc. Il ne s'agissait pas de patois, mais de véritables langues locales. Cette variété de "parlers maternels" ne facilitait pas le commerce interrégional, ni les déplacements des hommes. Assez tôt, la royauté semble avoir été défavorable à cette diversité linguistique. L'édit de Villers-Cotterêts, pris sous François I^{er} ordonne que la rédaction des actes officiels ne se fasse plus qu'en français. Il était surtout destiné à lutter contre le latin. Cependant un premier pas vers la généralisation de la langue française était franchi, qui contribua à l'élaboration de l'aire économique nationale." in Dockès, supra, note 35, at 41-42.

44. P. Dockès notes that if "le marché local ou de simple voisinage [et] le marché au long cours sont des catégories de marchés très anciennes, (...) le marché intérieur sera une invention des Temps Modernes, une production de l'Etat et des mercantilistes, et ce ne sera nullement par une évolution des marchés locaux ou par une fusion avec le grand commerce que naîtra ce marché "national" capitaliste et concurrentiel." e.g. supra, note 34, at 5-6. See also Beaud, supra, note 22, at 42. P. Dockès insists that "la lecture d'un auteur mercantiliste comme Bodin montre bien la naissance de l'espace économique national d'abord contre l'extérieur, par des frontières qui doivent séparer d'avec le reste du monde. (...) Dans la dialectique du dehors et du dedans qui préside à la construction de l'aire économique nationale, le dehors paraît précéder." see supra, note 34, at 10. See also Beaud, supra, note 22, at 8. P. Dockès also describes the birth of the French customs, which origin is quite remarkable :

"C'est Philippe le Bel qui a doté la France de véritables frontières douanières. L'occasion en fut la crise économique de début du XIV^e siècle, qui toucha particulièrement l'industrie drapière. Les producteurs de draps languedociens atteints durement par la concurrence étrangère demandèrent au roi d'interdire l'exportation des laines, des matières tinctoriales, des draps écrus. (...) les frapiers ne réclamaient pas la prohibition des importations, mais seulement celle des produits utiles à leur industrie. (...) Les producteurs de draps offrirent (...) de payer douze deniers sur chaque pièce de drap qu'ils vendaient en gros, sept sur celles vendues au détail si le roi interdisait l'exportation des matières premières utiles à l'industrie drapière. Par un mandement du 1^o février 1305, le roi accepta l'offre des drapiers. (...) Un "maître des ports et passages" fut institué et deux surintendants nommés. Rapidement un service se créa dont descend notre douane moderne." in Dockès, supra, note 35, at 44.

In the XVIIth century, customs were used as an instrument of industrial policy by Colbert. For Colbert, "Tout le commerce consiste à décharger les entrées des marchandises qui servent aux manufactures du dedans, charger celles qui entrent manufacturées, décharger entièrement les marchandises du dehors qui, ayant payé l'entrée, sortent pour le dehors, et soulager les droits de sortie des marchandises manufacturées au dedans du royaume." as cited in Dockès, id. at 47

45. Kenneth J. Arrow remarks that :

"... (although) efficiency can be achieved though a particular kind of social system, the price system (...) there are profound difficulties with the price system, even, so to speak, within its own logic, and these strengthen the view that, valuable though it is in certain realms, it cannot be made the complete arbiter of social life. One point (...) is that the price system does not in any way prescribe a just distribution of income. (...) ... in a strictly technical and objective sense, the price system does not always work. You simply cannot price certain things. A classical example (...) is the pollution of water or air. (...) A similar difficulty (...) is found in the case of road use. (...)

... from the point of view of efficiency as well as from the point of view of distributive justice, something more than the market is called for. Other modes of governing the allocation of resources occur. Most conspicuous among these is the government at all its levels. Government influences the allocation of resources by means that operate within the price system, but also otherwise. The government buys goods and services ; that is still working through the price system. The government collect taxes, and taxes are not prices. They are not a voluntary exchange. The government of course also has its host of laws and regulations, coercive and certainly nonmarket methods of controlling and directing the economy and indeed society in general." see supra, note 40, at 20-23.

A major difficulty with the internationalization of society is that it translates in a competition among states : the regulatory system of any given state - in a specific field (for example, a particular type of pollution regulation) or in its generality - is "priced" by international economic competition (localization of production activities on a given territory is partly decided by comparing the advantages of the localization to its costs), which may end up (in a global perspective) in an inadequate allocation of resources, for that very reason, explained by Arrow, that the price system does not always work ; see infra, §1.1.1 (2). Leaving aside the problem of a just distribution of income, which, at the international level, is the problem of under-development - which is certainly very severe and actual, but which is out of our scope of study, since it deals with a problem of redistribution of economic resources (see infra, Introduction, §2.(1)) - the whole purpose of creating international economic institutions is precisely to prevent the pricing of some states norms by the international markets ; see infra at §3.1. The whole conceptual difficulty there is in creating such

international economic institutions is that, for states as for any other organization, pricing is fundamentally efficient (for example, if there would be no competition with regards to taxation of the economic activity, such taxation would probably rise to unacceptable levels) ; the problem then is to find where organization should replace the price system (or, if one prefers, the market) and how to structure it in such a manner that it will not do more than necessary, i.e. how much of international organization do we need and to do what ; see infra, Part III, §3.1.2.

46. The nation-state, which in any version that would be recognizable to twentieth-century man is no older than the American constitution and the French revolution, born in 1787 and 1789, and national consciousness are the result of a deliberate effort to mobilize economic and social resources in the pursuit of large political aims ; e.g. The Economist's, December 22, 1990 at 73. The leaders who built the nation-states all wanted to use national economic activity to put muscle behind their political ambitions ; e.g. id., at 74.
47. Taxes constituting the basic resources of the states, states had an interest in developing an exchange economy because "tax collection and assessment are indissolubly linked to an exchange economy". The flow of goods and money are necessary for the understanding and especially for the evaluation of taxable materials. It is not enough to be aware of the volume of production because the economic structure sets a much lower limit. Agrarian societies of the past furnished the states with only minimal tax potential" ; see in Ardant, "Financial Policy and Economic Infrastructure of Modern States and Nations", in The Formation of National States in Europe, Princeton, New Jersey, Princeton U. Press (C. Tilly ed. 1975), at 166. See generally Ardant, G., Histoire de l'impôt, tomes 1 & 2, Paris, Fayard (1971 & 1972). Apparently, Vauban was the first in understanding the connection between exchange economy and development of the state : "il compare le "corps politique" au corps humain, soutient que le commerce d'un pays sert "à faciliter la circulation et le mouvement de l'argent non moins nécessaire au corps politique que celle du sang au corps humain" ; see Dockès, supra, note 35, at 159.
48. See Beaud, supra, note 22, at 60.
49. Id. at 60-62.
50. Deutsch et al., have used the term "integration" to mean the "attainment, within a territory, of a sense of community and of institutions and practices strong enough and widespread enough to assure, for a long time,

dependable expectations of peaceful change among its population" ; see in K. Deutsch et al., Political Community and the North Atlantic Area : International Organization in the Light of Historical Experience, Princeton, N.J., Princeton U. Press (1957), at 2 ; see also Haas, The Challenge of Regionalism, XII Int'l Org. 440 (1958), at 442. Haas himself defined integration as "the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new center, whose institutions possess or demand jurisdiction over the pre-existing national states." in E. B. Haas, The Uniting of Europe : Political, Social and Economic Forces, 1950-1957, Stanford, Stanford U. Press (1958), at 16. One of the main problems that integration theory has faced however, is the relation of a sense of community to behavioral interdependence ; see in Nye, Comparative Regional Integration : Concept and Measurement, XXII Int'l Org. 855 (1968), at 858. As noted by Nye, this relation becomes harder to investigate when both the sense of community and behavioral interdependence are built into the same concept ; id. Nye thus proposed to break down the concept of integration down into economic integration (formation of a transnational economy), social integration (formation of a transnational society), and political integration (formation of transnational political interdependence) ; Id. His analysis of economic integration remained rudimentary. We will concentrate our efforts on the analysis of this type of integration, but the type of approach we will use will lead us to make conclusions for the other types of integrations as well.

51. Pelkmans, in T. Heller & J. Pelkmans, "The Federal Economy: Law and Economic Integration and the Positive State - The USA and Europe Compared in Economic Perspective", in Integration through Law - Europe and the American Federal Experience, Vol.1, Methods, Tools and Institutions, Book 1, A Political, Legal and Economic Overview 245, Berlin, De Gruyter (M. Cappelletti, M. Secombe & J. Weiler eds. 1986) at 318. See also B. Balassa, The Theory of Economic Integration, London, Allen & Unwin (1962), at 1.
52. Pelkmans, id.
53. Id.
54. In its 1991 annual "Report on United States Trade Barriers and Unfair Practices", the European Community Commission expressed alarm at a growing trend toward protectionism or discriminatory legislation at the state level. It noticed a growing problem of fragmentation of the US market and regulatory system and that a seemingly growing number of barriers are being encountered at the state rather than at the federal level.

55. Originally, tariff duties only played a tax role. This explains how a country such as France could have many tariff frontiers within its own political borders, until the end of the XVIIIth century :

"Jusqu'à la fin du XIII^e siècle, les taxes perçues aux frontières ne semblaient pas plus élevées. Aucune disparité n'apparaissait dans les frais de transport aux limites de la France. (...) Il exista (...) jusqu'aux réformes de Colbert une union douanière entre l'Ile-de-France, l'Orléanais, le Berry, le Poitou, la Normandie, la Picardie et la Bourgogne. Les produits pouvaient circuler librement entre ces provinces, mais ils ne pouvaient en sortir sans acquitter les droits de Rêve, de Haut-Passage et d'Imposition foraine. (...) Les autres provinces qui formaient la seconde division de la France comprenaient, à l'époque du tarif de 1664, le Limousin, l'Auvergne, le Lyonnais, le Languedoc, l'Armagnac, le Bordelais, le Saintonge, la Bretagne et la Franche-Comté. Leur organisation douanière était extraordinairement complexe. (...) Les provinces acquises au XVII^e siècle formèrent une troisième catégorie, sous le nom de provinces à l'instar de l'étranger effectif. Elles jouissaient d'une parfaite franchise vis-à-vis de l'étranger, les marchandises qui en provenaient ne payaient de droits qu'en entrant dans les provinces "réputées étrangères" ou dans celles de l'union douanière." in Dockès, supra, note 35, at 44-46.

The situation was wholly different in England :

"Si le commerce extérieur de l'Angleterre était contrôlé par un système de douanes et de prohibitions, le commerce intérieur y était favorisé par rapport à celui de la France grâce à l'absence de frontières intérieures." id. at 52.

This major difference between France and England may have played a significant role in the early development of the English economy, which economic actors benefited from a larger internal market very early, while French ones were restricted by internal tariff barriers

56. See W.O. Henderson, The Genesis of the Common Market, London, Frank Cass & Co. Ltd (1962).
57. The European Community is composed of three separate communities, established by distinct treaties : the Treaty establishing the European Coal and Steel Community, signed in Paris on April 18, 1951 ; the Treaty establishing the European Economic Community signed in

Rome on March 25, 1957 ; and the Treaty establishing the European Atomic Energy Community, signed in Rome on March 25, 1957. It is however warranted to speak about the "European Community" : in a resolution adopted on February 16, 1978, the European Parliament considers that the expression "the European Community" is appropriate to designate the institutions created pursuant to the treaties establishing the three European Communities as well as the group composed by the Member States ; see J.V. Louis, L'ordre juridique communautaire, Office des Publications Officielles des Communautés Européennes, (5° ed., 1990), at 8. It is also warranted to speak about the constitution of the European Community ; see id. at 71. In addition to the three original treaties creating the European Community, the constitution of the European Community comprises the Brussels treaty of April 8, 1965, the so-called "Merger Treaty", establishing a Single Council and a Single Commission of the European Communities (O.J.E.C. 1967, No. 152), the Luxembourg treaty (Treaty amending Certain budgetary Provisions) of April 22, 1970 (O.J.E.C. 1971, No. L.2) ; the Brussels treaty (Treaty amending Certain Financial provisions) of July 22, 1975 (O.J.E.C. 1977 No. L 359) ; the Act concerning the election of the representatives of the European Parliament by direct universal suffrage (O.J.E.C. 1976, No. L 278), and the Single European Act signed in Luxembourg and in the Hague on February 17 and 28, 1986 (O.J.E.C. 1987, No. L 169). In addition there are three Acts of Accession, adjusting the original Treaties, the Act of January 22, 1972 on the accession of Denmark, Ireland and the United Kingdom (O.J.E.C. 1972, No. L 73), the Act of May 24, 1979 on the accession of Greece (O.J.E.C. 1979, No. L 291) and the Act of June 12, 1985 on the accession of Portugal and Spain (O.J.E.C 1985, No. 302).

58. It is the recognized function of the public law of international trade to restrain governments from interfering in private economic transaction involving the exchange of goods ; e.g. Abbott, The Trading Nation's Dilemma : the Functions of the Law of International Trade, 26 Harv. Int'l L. J. 501 (1985), at 501.
59. See infra, Part III.
60. A. Viravan, et al., Trade Routes to Sustained Economic Growth - Report of a Study Group of the Trade Policy Center, London, MacMillan press, for the U.N. (1987), at 20.
61. Id. at 30.
62. Id. at 25-26.

63. Id. ; see Tumlir, "GATT Rules and Community Law - A Comparison of Economic and Legal Functions" in The European Economic Community and the GATT 1, Kluver, Deventer, the Netherlands (M. Hilfs, F.G. Jacobs & E.-U. Petersmann eds. 1986), at 3.
64. Viravan, supra, note 60, at 27.
65. Id.
66. Progress on the international monetary rules is necessary, but the study of the shortcomings of the international monetary order is beyond the scope of this book. One can hope, with Norman Macrae (The Economist's former deputy editor) that in the second quarter of the next century, the world will be run with a single currency under the control of a centrobank, a global central bank answerable to no politicians ; The Economist's, December 22, 1990 at 75. The creation of the European Single Currency is a first step towards that aim. Bergsten, who has made several proposals for the creation of a new international economic order, remarked that "Money and trade would be the most essential components of such a package. The Big Three [the United States, the European Community and Japan] should start the process by launching the construction of a new international monetary regime to replace the Bretton-Woods system that collapsed in 1971-1973. No system worthy of the name has existed since that time, with enormous cost for the world-economy. But stable and effective monetary arrangements are as crucial to the world economy as national monetary stability is key to each individual country." see Bergsten, The World Economy after the Cold War, Foreign Aff. 96 (1990). Within Europe, 10 of the 12 Member States agreed at the Maastricht summit held on December 9 & 10, 1991 to introduce a single currency at least by the start of 1999. The Economist's has, as usual, clearly and shortly described the reasons for "the heart of its preference for a single currency" :
- "... each EC government, deprived for ever of the delusion that it could devalue its own currency in order to make its industry competitive, would have to tackle the true causes of uncompetitiveness : demoralizing high taxation, red tape, restrictive labour practices, poor education and training, etc. The list is long, but at least it is a true one." in issue of September 14, 1991, p. 16.
67. The term "reciprocity" is usually used to denote the relation existing between two states when each of them gives the subjects of the other certain privileges, on condition that its own subjects shall enjoy similar privileges at the hands of the latter state ; see e.g. Black's Law Dictionary.

68. The introduction of the Most-Favored-Nation ("MFN") clause in a treaty means that if any of the states party to the treaty would grant higher advantages to a third state by treaty, the other state would benefit from the treatment given to the most-favored nation. The role of the MFN provision is to link commercial treaties through time between states. The unconditional form of MFN, which consists in guaranteeing equal treatment without requiring directly reciprocal concessions, was used exclusively until the end of the XVIIIth century, when the United States inaugurated a practice of agreeing to conditional MFN only, i.e. to provide equal treatment conditional upon adequate compensation. The position of the United States as a newcomer to world commerce largely accounts for its novel interpretation of the MFN clause. It is only in 1923 that it adhered to unconditional MFN. See generally J.H. Jackson & W.J. Davey, Legal Problems of International Economic Relations, St. Paul, Minn., West Pub. (2nd ed. 1986), at 430-432.
69. The National Treatment clause attempts to impose the principle of non-discrimination as between goods which are domestically produced, and goods which are imported. e.g. id. at 483.
70. Viravan, supra, note 60, at 26.
71. V. Curzon, The Essentials of Economic Integration - Lessons of EFTA Experience, London, MacMillan (1974), at 95.
72. Youngquist, "United States Commercial Treaties : their Role in Foreign Economic Policy", in Law and Economic Development, Vol. II, Study no. 1, at 72,73-74.
73. See infra, Part III, ft. --.
74. But there remain difficult problems at the level of the protection of property rights, especially intellectual ones, which have been negotiated during the Uruguay Round of GATT negotiations.
75. Pelkmans, supra, note 51, at 329. Hence, as a consequence of the nationalization of the US market, while there were large discrepancies in personal income from one region to another within the United States in 1929, these discrepancies were practically eliminated over the next seven decades ; The Economist's, December 22, 1990, at 76. In 1929, the average personal income per head as a percentage of US average was 137 in the Midwest while it was 50 for the South-east ; in 1990, these two regions were still the extremes, but the figures were respectively 107 and 93 ; id.

76. Pelkmans, id. at 319. According to The Economist's, id., it is not too fanciful to believe that the technologies of production, information and communication have now entered a phase that would allow the same sort of convergence as the one which occurred in the United States since the Great Crisis of the inter-war period to happen worldwide by the year 2100 ; id. This will come to pass only if the fewest possible restraints are placed on the movement of people, companies, money, goods, services and ideas ; id. Letting these things find their right rates of return is what both raises and equalizes incomes ; id.
77. However, the difference between efficient and inefficient regulation (because protectionist) is complex, and saying that protectionism should be rejected because it is inefficient begs the question of what efficient and inefficient regulation is. On this issue, see infra, §1.2.1.4.
78. The Wall Street Journal Europe, December 17, 1990, citing Bergsten.
79. J.H. Jackson, World Trade and the Law of GATT, New York, Bobbs-Merrill Co. (1969), at 10.
80. See infra, Part III, at §3.1.4.1.
81. Id. See also John H. Jackson, Restructuring the GATT System, The Royal Institute of International Affairs, Pinter Publishers, London, 1990, at 2. More than simply reducing risks of war, trade may also be a fundamental factor in the keeping of an open, free society. According to Karl Popper,

"[Notre civilisation] ne s'est pas encore remise du choc de sa naissance, du passage de la société tribale ou close, soumise à des forces magiques, à la société ouverte, qui libère les capacités critiques de l'homme, et (...) c'est (...) le choc de cette transition qui favorise les mouvements réactionnaires orientés vers un retour au tribalisme" ; in La société ouverte et ses ennemis, tome 1, "L'ascendant de Platon", Paris, Editions du seuil (1979, 1st ed. 1962), at 9. And for Popper, "La cause principale de la chute de la société close doit être recherchée dans le développement du commerce et des communications maritimes. Rien n'est plus apte à ébranler la confiance dans le caractère intangible des institutions tribales que le contact avec d'autres populations. Or, le commerce est sans doute une des rares activités où, même dans une société encore tribale, l'initiative personnelle peut se manifester.

Aussi la navigation et le commerce ont-ils été la principale affirmation de l'impérialisme athénien au cours du V^e siècle avant J.-C. ; et il est de fait que les oligarches et les membres des classes qui étaient ou avaient été privilégiés les dénoncèrent comme des activités particulièrement dangereuses. Pour eux, il ne faisait aucun doute qu'à Athènes le commerce, les transactions monétaires, la politique navale et les tendances démocratiques étaient un tout inséparable." Id. at 145.

82. As reminded by Clark, he was one of the few who saw, after World War I, that the diplomats were laying the ground work for World War II ; The Wall Street Journal Europe, issue of November 11, 1991, Peace and Free Trade Should Go Together. Writing in 1919, Keynes proposed, as part of a plan to head off disaster, a free trade union to be established under the auspices of the brand new League of Nations ; id. Keynes' free trade union never materialized, and the nations moved to World War II ; id. After World War II, Keynes led the discussions at Bretton Woods that produced the International Trade Organization ; id. The ITO never came to life because of US dislike, and the world has been left since with only the General Agreement on Tariffs and Trade ; see infra, §1.2.2.2. Free trade still needs work, and the aim is still peace.
83. But more importantly, this is so because it is in the interest of dynamic exporting local producers.
84. See generally P. Salins, Libre-échange et protectionisme, PUF, Paris, 1991, at 92-102.
85. Salins, supra, note 84, at 105-106.
86. See id. at 5-14. K. Arrow puts it in a colorful way :
"The blacksmith in the primitive village is not expected to eat horseshoes ; he specializes in making horseshoes, the farmer supplies him with grain in exchange, and both (this is the critical point) can be made better off." supra, note 40, at 19.
87. Speaking in terms of justice in exchange is important because it allows us to bring into the picture the role of law and courts. One of the universally recognized purposes of private law is to ensure justice precisely by implementing the principle of suum cuique tribuere, (see in Encyclopédie Dalloz, Jestaz, "Droit", n°6) i.e. this principle pursuant to which courts should only make shure to render to everyone his own (e.g. Black's Law Dictionary). Ensuring justice is certainly one of the ends of law generally speaking and thus should also be

one of the purposes of international law in general, and of international economic law in particular. Allowing a proper functioning of international markets is, because it is a partial implementation of the suum cuique tribuere, a fulfillment, albeit partial, of this purpose.

88. Salins, supra, note 84, at 38.

89. Id. at 38-39.

90. But see role of dynamic local producers in Part III.

91. See supra, Introduction, §0.(3).

92. For Arrow,

"... there are profound difficulties with the price system, even, so to speak, within its own logic, and these strengthen the view that, valuable though it is in certain realms, it cannot be made the complete arbiter of social life. One point, and a difficult one indeed, (...) is that the price system does not in any way prescribe a just redistribution of income." supra, note 40, at 22.

93. Such a "deal" was attempted during the Uruguay Round ; see generally infra, Part II, §3.2.3.

94. Id. See generally R. Gilpin, supra, note 30, at 31-34 for the nationalist argument against free trade partly deriving from such considerations. With regards to foreign direct investments, although a policy of non-discrimination would stimulate growth through more efficient production and bring prices down through greater competition, in some exceptional cases, other valid policy considerations may warrant discriminations (for example to protect the domestic defense related industry and the media) ; see DeAnne Julius, supra, note 9, at 97-105.

95. Article XX of the GATT provides that :

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures :

- (a) necessary to protect public morals ;
- (b) necessary to protect human, animal or plant life or health ;
- (c) relating to the importation or exportation of gold or silver ;

- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including (...) the protection of patents, trade marks and copyrights, and the prevention of deceptive practices ;
- (e) relating to the product of prison labour ;
- (f) Imposed for the protection of national treasures of artistic, historic or archaeological value ;
- ...

96. Article 36 of the Rome Treaty provides that :

"The provisions of Articles 30 to 34 [relating to the elimination of quantitative restrictions and measures having equivalent effect between the Member States] shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security ; the protection of health and life of humans, animals or plants ; the protection of national treasures possessing artistic, historic or archaeological value ; or the protection of industrial or commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

97. G. Scelles was writing in his Manuel élémentaire de droit international public, Paris (1943) :

"... au sein de la société internationale universelle ou oecuménique, il se forme des groupements de peuples ou d'Etats rapprochés par des phénomènes de solidarité plus étroits tenant à la communauté d'origine ou de race, à la continuité géographique, et surtout à l'intensité des échanges, au volume du commerce international." At 20, emphasis added.

G. Scelles was thus insisting on the importance of international economic intercourse for the creation of communities. The creation of such communities within the international society seems to require the sharing of some fundamental values. On the role of cultures as a structuring factor in the international society, F. Braudel remarks :

"Les cultures (ou les civilisations : les deux mots, quoi qu'on en dise, peuvent s'employer l'un pour l'autre dans la plupart des cas) sont aussi un ordre organisateur de l'espace, au même titre que les économies. Si elles coïncident avec celles-ci (en particulier parce que l'ensemble d'une économie-monde, dans toute son étendue, tend à partager une même

culture, au moins certains éléments d'une même culture, en opposition avec les économies-mondes voisines), elles s'en distinguent aussi." (supra, note 1, at 51).

A community of culture doesn't necessarily imply the inclusion within a common world-economy. However, within any given world-economy, some elements of a common culture must be shared. It goes beyond the scope of our study to elaborate at length on this question of a fundamental practical importance. One can notice, however, that in the context of the changes in what used to be the Eastern world-economy, the progressive integration of the countries which used to be part of such world-economy in the Western world-economy (see supra, note 1) is accompanied by a necessary modification in the values and ideologies underlying their internal institutions. On the fact that no full integration within the GATT-system was possible without an economy functioning pursuant to market mechanisms, see, for example, Patterson, Improving GATT Rules for Nonmarket Economies, 20 J.World Trade L. 185 (1986) ; see also Kennedy, The Accession of the Soviet Union to GATT, J. World Trade L. 23.

On another, but related, topic, the role of Japan in today's world, together with its weird culture and values in an occidental perspective, will make the development of the institutions of an improved international economic integration difficult. Simultaneously, there are also serious differences between Europe and the United States, which become more obvious now that the cold war is over ; the Wall Street Journal Europe notes in this respect that "Without the unifying glue of the Soviet threat, tensions among various Western countries have burgeoned in a way that few leaders seem prepared for." see Post-Cold War World Seems a Bit Less Warm As GATT Talks Fail, issue of December 10, 1990.

At stake is the meaning of such founding (but loose) principles of liberal-market-democratic society as the principle of equality (and how, for example, it should prevent governments from subsidizing failing producers), and generally of those mushy values such as freedom, non-discrimination, democracy, etc... without which no market-society can meaningfully function as a just society, allowing to effectively resist the demands of losers. R. Schuman, one of the Founding Fathers of the European Community, perceived Europe as "un des noyaux solides d'une future structure politique du monde" ; see in Pour l'Europe, Genève, NAGEL (1990, 1st ed. 1963), at 183. But he was also warning that :

"La question qui se pose est de savoir si une communauté mondiale est réalisable et dans quelle mesure. Nous avons vu jusqu'ici des initiatives partielles. Peut-on, avec une efficacité suffisante songer à avoir une organisation universelle comprenant pratiquement tous les pays du monde ? Ici, il faut voir les choses très franchement, en réalistes, non seulement à la lumière des idées qu'on peut avoir, mais des expériences que nous avons faites, soit au sein de la Société des Nations, soit au sein de l'Organisation des Nations Unies.

...

Pour s'entendre et pour construire une union étroite, il n'est pas interdit de se distinguer dans une certaine mesure, mais il faut aussi être sûr qu'il existe suffisamment de liens et d'idées communes." id. at 193 & 196.

98. See infra, Introduction, §0.
99. As noted by Nye, "Many integration theorists have used the definition and categorization of economic integration elaborated by Bela Balassa. Balassa defines economic integration as the abolition of discrimination between economic units belonging to different national states." see supra, note 50, at 860. Balassa's insight that economic integration amounts to abolition of discrimination is right, but his approach was not developed in sufficient details to allow to deal with the issue of rising non-tariff barriers.
100. Balassa, supra, note 51, at 2.
101. See Pelkmans, supra, note 51, at 324.
102. Balassa, as cited by Pelkmans, id.
103. See infra, Part III, §3.1.
104. Seidl-Hohenveldern, International Economic Law, 198 R.C.A.D.I. 9 (1986), at 128.
105. Hindley gave the following example : when, in order to promote a policy, a state distorts the market, and this has consequences at the level of the market on which the [exporting] American firm operates, then this distorts the market for the American firm too, and the industrial policy decision made abroad also changes the signals received by the American firm. The foreign industrial policy will then have extra-territorial effects ; see in Hindley, "Subsidies, Politics and Economics", in Interface Three, 29, at 30.

106. DeAnne Julius makes a similar point when explaining that foreign direct investments may create systemic problems for the regulation of financial markets, or where issues of public safety or the environment are involved, which may require policy coordination among states. She insists that policy coordination should be limited, focused and attempted only where the problem to be avoided is clearly a systemic one. See supra, note 9, at 93-95.
107. The Montreal Protocol on Substances that Deplete the Ozone Layer, opened for signature Sept. 16, 1986, 26 I.L.M. 1541, entered into force on January 1, 1989, and established specific obligations to limit and reduce the use of chlorofluorocarbons that deplete the ozone layer.
108. See, for example, The Economist's, issue of June 23, 1990.
109. States refusing to cooperate (hold-outs) and states who enjoy the benefits of international regulation while refusing to share the costs of regulation (free riders) may render international agreements ineffective ; e.g. Note, supra, note 2, especially at 1534. Hold-out states can not only prevent other states from reaching effective agreements, but also exacerbate the underlying environmental threat. id. See also Kiss, Le droit international de l'environnement, Paris, Pédone (1989), at 7. On the role of Article 100 of the Rome treaty to avoid this problem, see id. and infra, Part II, §2.1.2.
110. For examples of statutes of this kind, see the Oregon Bottle Law, infra, Part II, §2.2.1.1, and the Danish Bottle Law, infra, Part II, §2.2.2.6.
111. Except to reduce the implied non-tariff barriers ; see infra, Part II, §2.0.1. In Europe, the principle of subsidiarity which is at the root of the institutions means that each decision should be taken at the lowest possible level ; e.g. Brittan, "A Better UK Road to Maastricht", in The Financial Times, issue of October 31, 1991. On the way down to finding the lowest level of decision making, we find the individual, who, in liberal society, is the prime decision-maker ; only this which can not appropriately be decided at the individual level should be decided by institutions ; and only this which can not be appropriately decided at the decentralized political level should be decided at a more centralized level ; etc. The principle of subsidiarity is thus congruent with a liberal individualistic society. For Brittan, the interpretation of the principle of subsidiarity

"... is perhaps clearest in relation to the environment. Matters affecting global warming or the ozone layer or atmospheric pollution clearly have spillover effects, and need to be regulated at a European, if not still higher, level. The condition of beaches, or most matters relating to rail and road construction, have their main impacts on the inhabitants of an area or those who choose to go there. At the very most, central control should be limited to the provision of information so that the visitors know the risks they run." id.

112. A clean environment is a type of public good which can be purchased only by collective action and through coercion of those who would not otherwise want to participate in such acquisition. Coercion is a problem, but can be legitimated in the following manner - which in turn explains why there is need for decentralized political institutions :

"[It is clearly] in the interest of the different individuals to agree that the compulsory levying of means be used also for purposes for which they do not care so long as others are similarly made to contribute to ends which they desire, but the others do not. (...) all we can aim at will be that each should feel that in the aggregate, all the collective goods which are supplied to him are worth at least as much as the contributions he is required to make. [Thus] A satisfactory arrangement for the provision of collective goods seems to require that the task be to a great extent delegated to local and regional authorities. (...) the delegation of all powers that can be exercised locally to agencies whose powers are confined to the locality is probably the best way of securing that the burdens of and the benefits from government action will be approximately proportional." See in Hayek, supra, note 11, at 45-46.

113. Heller, in Heller & Pelkmans, supra, note 7, at 248.
114. See id. ; see also Balassa, Towards a Theory of Economic Integration, 14 KYKLOS 1 (1961), especially at 8-11 ; and Balassa, supra, note 51, at 7-9, for the "liberalist" and "dirigist" ideals of economic integration. For a rather extreme liberalist view, see generally Röpke, Economic order and International Law, 86 R.C.A.D.I. 202 (1954).
115. See Heller, in Heller & Pelkmans, supra, note 7, at 247.
116. Id. at 260.
117. Id.

118. Id. at 247.
119. e.g. id. at 251.
120. Id.
121. Id.
122. Id.
123. Id.
124. Id.
125. See A. Cassese, International Law in a Divided World, Clarendon Press, Oxford (1986), at 13-14. The Three main legal functions typical of any legal system (law-making, law-determination and law-enforcement) are decentralized. As a consequence, organizational rules, "secondary rules" are at a very embryonic stage.
126. See supra, Introduction, §3..
127. Saying what GATT is in a few words is a desperate task. Prior to try to understand some of the elements of functioning of this monster, the reader should be aware of some of the reactions of disarray from serious students who have been confronted to GATT's incredible complexity : Senator Millikin declared that "anyone who reads GATT is likely to have his sanity impaired" (1951 Senate Hearings, Senate Finance Committee, p. 92) ; one of the draftsmen of GATT, Winthrop Brown, declared at the same hearings : "I think your difficulty ... is the inherent difficulty of the subject ... I must admit I am thoroughly confused" (1951 Senate Hearings, Senate Finance Committee, p. 1061, 1076) ; even after the lapse of some time after the drafting of GATT, Gardner noted that "only ten people in the world understand it, and they are not telling anybody" (in In Pursuit of World Order, New York (1966), at 148-149).
128. See in Bhagwati, Multilateralism at Risk - The GATT is Dead, long Live the GATT, 1990 World Econ. 149.
129. For example, tariff barriers against imports in the EEC are of a trade-weighted average of 5.1% ; see Financial Times, April 17, 1991.
130. Jackson, supra, note 79, at 297. Professor Jackson describes the GATT as

"... the least handsome of all major international institutions of our time. It began as only one wheel of a larger machine, the ill-fated International Trade

Organization, and, when that larger machine fell apart before leaving the assembly line, this wheel became a unicycle on which burdens of the larger machine were heaped. The unicycle, for reasons not quite fully understood, has continued to roll through two decades since it was put together. To be sure, it takes careful balance to keep it rolling and ad hoc repairs and tinkering have brought it to a point where the bailing wire and scrap metal that hold it together form an almost incomprehensible maze of machinery." Id. at 3.

131. Jackson, National Treatment Obligations and Non-Tariff Barriers, 10 Mich. J. Int'l L. 207 (1989) ; at 207.
132. On the procedures used, see infra, Part III, §3.2.1.
133. Jackson & Davey, supra, note 68, at 295.
134. Jackson, supra, note 131, at 208.
135. Id.
136. Jackson & Davey, supra, note 68, at 297.
137. Van Bael, The GATT Dispute Settlement Procedure, 22 J. World Trade L. 67 (1988), at 67.
138. Id.
139. See Plaisant, L'organisation internationale du Commerce, 1950 R.G.D.I.P. 161, at 162. A definition of "subsidy" given by Malmgren embodies "any government action which causes a firm's, or a particular industry's total net private cost of production to be below the level of costs that would have been incurred in the course of producing the same level of output in the absence of government action". This presumably includes the subsidizing effect of tariff protection. See, e.g. Horlick, Quick, Vermulst, Government Actions against Domestic Subsidies : an Analysis of the International Rules and an Introduction to the American Practice, 1 Legal Issues of Eur. Integration 1 (1985), at 2.
140. Jackson, supra, note 131, at 208.
141. E.g. Jackson, The Puzzle of GATT, 1 J. World Trade L. 131 (1967). In contradistinction to non-prohibitive tariffs and tariff-like measures, quantitative restrictions completely break any link between domestic and world prices ; see Jackson & Davey, supra, note 68, at 421.

142. Article XI, 1st paragraph provides that

"No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

Article XI, 2nd paragraph provides for a whole series of exceptions.

143. Article XII provides a contracting party with an exception "in order to safeguard its external financial position and its balance of payments" ; Article XIII provides for a principle of non-discrimination in the administration of quantitative restrictions ; Article XIV provides exceptions to such principle ; finally, Article XV provides for rules concerning quantitative restrictions in connection with exchange issues.

Even though they are theoretically prohibited by GATT, quotas are widespread in today's world. Most quotas applied by developed countries are designed to afford protection to farmers, clothing and textile makers and steel producers. For the pattern of quotas applied by the United States, see Jackson & Davey, supra, note 68, at 423. In addition to quotas, one must also take into account the Voluntary Restraints Agreements of exporters in numerous industries ; see infra, §1.2.1.3(1).

144. Id.

145. Id.

146. Id.

147. See supra, note 69.

148. Jackson & Davey, supra, note 68, at 297.

149. Jackson, supra, note 131, at 208.

150. See supra, note 67.

151. See generally, Jackson, supra, note 79, at 163.

152. Van Bael, supra, note 137, at 67.

153. Jackson, supra, note 79, at 164-165.

154. Id. at 164.

155. Id. at 166.
156. Van Bael, supra, note 137, at 68.
157. Id.
158. Id.
159. See Jackson, supra, note 79, at 170-171.
160. U.N. Doc. EPCT/A/PV.6, at 5 (1947).
161. Jackson & Davey, supra, note 68, at 334.
162. Jackson, supra, note 79, at 169.
163. Id.
164. Id. ; A United States delegate was proudly describing what has been done in the following terms : "What (...) have we done in Article 35 (of the ITO - but Article XXIII of GATT is almost equivalent to it) ? We have introduced a new principle of international economic relations. We have asked the nations of the world to confer upon an international economic organization the right to limit their power to retaliate. We have sought to tame retaliation, to discipline it, to keep it within bounds." See R.E. Hudec, The GATT Legal System and World Trade Diplomacy, New York, Praeger Pub. (1975), at 36.
165. Jackson, supra, note 79.
166. Id.
167. Jackson & Davey, supra, note 68, at 334.
168. Id... However, a breach of obligations does raise a prima facie nullification or impairment ; id. at 181-182.
169. See Hudec, "Regulation of Domestic Subsidies under the MTN Subsidies Code", in Interface Three : Legal Treatment of Domestic Subsidies, 1 (Wallace, Loftus & Krikorian eds. 1984), at 2.
170. Id. at 4 ; Davey, Dispute and Settlement in GATT, 11 Fordham Int'l L. J. 51 (1987), at 51.
171. Lacharrière, Case for a Tribunal to Assist in Settling Trade Disputes, 8 World Econ. 339 (1985), at 340.
172. Id. See also Finger, Picturing America's Future : Kodack's Solution on American Trade Exposure, 12 The World Economy 377 (1991), at 379.

173. Lacharrière, Id.
174. Pescatore, "Introduction" to The European Economic Community and the GATT, Kluwer, Deventer, The Netherlands (M. Hilfs, F.G. Jacobs & E.-U. Petersmann eds. 1986), at xvi.
175. Jackson & Davey, supra, note 68, p. 367.
176. (1) Geneva, Switzerland, 1947 ; (2) Annecy, France, 1948 ; (3) Torquay, England, 1950 ; (4) Geneva, 1956 ; "Dillon Round", Geneva, 1960-61 ; (6) "Kennedy Round", Geneva, 1964-67 ; (7) "Tokyo Round", Geneva, 1973-79. A new Round, the "Uruguay Round", has been launched in september 1986.
177. J. Bhagwati, Protectionism, Cambridge, Mass., M.I.T. Press (1988), at 3 ; By the early 1980s, the average tariff level had gone to 4.9 percent in the United States ; 6.0 percent in the European Economic Community, and 5.4 percent in Japan.
178. Id.
179. See supra, note 141.
180. See generally Jackson & Davey, supra, note 68, §9.4.
181. See infra, note 379.
182. See Jackson & Davey, supra, note 68, et 614. For an explanation on how a third country can be harmed, see infra, note 379.
183. Bhagwati is virulent to "dismiss an influential but nonetheless frivolous critique directed at the GATT and [its main principles]. It is that the GATT is in truth the General Agreement to Talk and Talk : it has delivered nothing. This is nonsense. Under GATT auspices, tariff barriers of the developed countries were reduced to almost negligible levels ; the Tokyo Round negotiations then began the assault on non-tariff barriers in a process that is now being pursued further, along with the task of extending GATT discipline in new sectors, in the Uruguay Round negotiations." See in Bhagwati, supra, note 128, at 150-151.
184. See in Sandholtz & Zysman, 1992 : Recasting the European Bargain, Draft (1989), at 20.
185. Id.
186. Curzon, supra, note 71, at 5.

187. Id.
188. Id. at 5-6.
189. Schildhaus concludes that "the model of the "1992 European Experience" has now laid the foundations for future plurilateral and multilateral treatment of international trade, within or without the GATT". Schildhaus, 1992 and the Single European Act, 23 The International Lawyer 549 (1989), at 555.
190. Except in the case of regional policies, where internal discriminations are decided by the policy in favor of some region judged "disfavored". The discrimination here is of a communitarian character, decided by the encompassing policy, and has nothing to do with the type of discrimination we deal with, decided at the decentralized level for protectionist motives, and not because of some other defendable type of policy.
191. If Y sells at 100, X will need to have costs below 75 to be able to compete : $(75 + (75 \times 1/3)) = 100$.
192. See generally Trubek, "Consumer Law, Common Markets and Federalism : Introduction and General Concepts", in "Consumer Law, Common Markets and Federalism in Europe and the United States" 1 (T. Bourgoignie & D. Trubek eds.), vol. 3 of Integration Through Law - Europe and the American Federal Experience, Berlin, de Gruyter, (M. Cappelletti, M. Secombe & J. Weiler general eds. 1987), at 6-7.
193. Id.
194. See, for example, P.J. Slot, Technical and Administrative Obstacles to Trade in the EEC, Leyden, A-W sijthoff (1975), at 149 ; see also DeAnne Julius, supra, note 9, at 94.
195. See Trubek, supra, note 192, at 4.
196. Tumlrir, supra, note 63, at 1.
197. Pescatore, supra, note 174, at xv.
198. Id. at 10.
199. Id. at 14.
200. From a strictly normative viewpoint, it has made little difference that the Community was established by a network of treaties rather than by a formal constitution, due to the impact of the Court of Justice. From its

inception, the Court has construed the Treaty of Rome in a constitutional mode rather than employing the international law methodology of treaty interpretation. It held that the Treaty created "a new legal order", conferring rights and imposing obligations not only on the member states, but also directly on the nationals of the member states which national courts must enforce. See, e.g., Stein, Treaty Based Federalism, 127 U. Pa. L. Rev 897 (1979), at 901. See also, Hartley, Federalism, Courts and Legal Systems : the Emerging Constitution of the European Community, 34 Am. J. Comp. L. 229 (1986).

201. Tumlir, supra, note 63, at 10.
202. Id. For an analysis of EEC law in relation to this question, see generally Ehlermann, "Application of GATT Rules in the European Community", in The European Economic Community and the Gatt, 127, supra, note 63 ; for the situation in the United States, see Hudec, "The Legal Status of GATT in the Domestic Law of the United States" in The European Economic Community and Gatt 187, id.
203. Following a collapse of GATT talks during the Uruguay Round, Carla Hills, the United States Trade Representative during the later phase of the Round, declared that "as long as we don't have an effective multilateral system, it's very hard to tell our elected representatives that they can't protect national interests." See in The Wall Street Journal Europe, December 10, 1990.
204. K.W. Dam, The GATT - Law and International Economic Organization, The University of Chicago Press, Chicago (1970), at 10.
205. Id. ; the influence on US thinking of Secretary of State Cordell Hull can not be overstated ; he was writing in 1937: "I have never faltered and will never falter, in my belief that enduring peace and the welfare of nations are indissolubly connected with friendliness, fairness, equality and the maximum practicable degree of freedom in international trade." id. at 12.
206. Id.
207. Cf. id.
208. See Baldwin, "The Changing Nature of US Trade Policy Since World War Two", in The Structure and Evolution of Recent U.S. Trade Policy 5, Chicago U. Press, Chicago (R. Baldwin & a. Kreuger eds. 1984), who recalls that before the end of World War II, the leaders of the democratic party had become certain that the lack of an open world-economy had let to the war, which explains why they proposed the creation of an international trade organization.

209. Id.
210. Henderson, supra, note 56, at 56.
211. Id. On Colbert and the use which should be made of tariff according to him, see supra, note 43.
212. Id.
213. There had been a previous - and short-lived - Anglo-French commercial treaty in 1786, and the reasons for its adoption are quite significant. Because of prohibitions and high excise duties, smuggling was rife between the two countries, while legitimate trade languished ; Id. at 45. Economists were providing a favorable climate of opinion to support a relaxation of restrictions impeding trade, but what really influenced governments in their liberalization efforts were considerations of the utmost practical character : both urgently needed to increase their revenues ; Id. France especially was on the verge of bankruptcy, with a national debt of 3,500 millions livres, and urgently needed a reform of its finances. An obvious method of increasing revenues would be to augment the income derived from import duties : if prohibitions were abolished and import duties reduced, then legitimate trade would expand ; Id. at 46. The French tariff was a French statute : it could therefore be reformed without reference to the commercial policies of other countries ; Id. at 45. But if French import duties were reduced as the result of a commercial treaty with Britain, a twofold advantage might be secured : more revenues from import duties, and greater opportunities to sell in Britain ; Id. at 45 ; political motives also influenced the negotiations : Britain and France were traditional enemies, and a liberal commercial treaty could well be the first step toward reconciliation ; id. at 46. The rationale for the 1786 Anglo-French treaty is therefore obvious, but it does not apply to the Cobden-Chevalier treaty.
214. According to The Economist's, protectionism and preferential trade is a major reason for Britain's economic decline.

"Chamberlain marked the beginning of the end of half a century in which British citizens had bought goods from across the world on the same terms as those made at home. A slow slide led down through the protectionism of the 1930s to a warped normality where British industry enjoyed just the protected access to imperial, later Commonwealth, markets that Chamberlain had envisaged. It would be a dishonest British

industrialist today who denied that such preference, which still coddled half the country's exports in the 1950s, played a part in Britain's post-war decline. It bred a complacency that allowed markets after market to slip away to more energetic suppliers." See issue of May 4, 1991, at 19.

215. Henderson, supra, note 56, at 59.
216. Id.
217. Id.
218. Id.
219. Id.
220. Id. Cobden wrote to Chevalier : "It would of course be agreeable to me to see your Minister of State. But I attach very little importance to such interviews ; for there is always a latent suspicion that I, as an Englishman, in recommending other governments to adopt free trade principles, am merely pursuing a selfish British policy. Thus my advice is deprived of all weight and even my facts are doubted... But on totally different grounds I would be glad to see a removal of the impediments our foolish legislations interpose on the intercourse between the two countries" ; see Bhagwati & Irwin, The Return of the Reciprotarians - US Trade Policy Today, 10 World Econ. 109 (1987), at 121.
221. Id. The treaty will give rise to many strong reactions from French industrialists. To give an idea of the protectionist climate in the Corps Législatifs, here are some of the remarks made by the députés : "Ils ont livré à l'Angleterre l'avenir et la fortune industrielle de la France" (Pouyer-Querties) ; "Il est une date néfaste pour un certain nombre de nos industries ; je doute qu'il s'en soit rencontré une plus funeste pour la France depuis la révocation de l'Edit de Nantes ; c'est celle du 23 janvier 1860... celle du traité Franco-Anglais couvrant de ruines toute une partie de notre pays" (Lesperut). In the same vein, the Comité des Forges, a very powerful lobby group of steel makers, will be created in 1864 to defend the French iron and steel metallurgy against competition brought by free trade ; see generally M. Tacel, Restaurations, Révolutions, Nationalités, 1815-1870, Paris, Masson (3ème ed. 1981), at 210. For a description of this "coup d'Etat commercial", see G. Duby, Histoire de la France, Flammarion, 1970, p. 454-455.
222. Britain never had a policy of complete free trade because tariffs represented a sizeable fraction of her revenues - as much as two fifth in the 1850s ; see Bhagwati & Irwin, supra, note 220, at 59.

223. Henderson, supra, note 56, at 59. The tariff concessions were therefore were not the kind of reciprocal concessions which the earlier treaty of 1786 had tried to get from the agreement.
224. Id.
225. Id.
226. Id.
227. Id. at 60.
228. Id.
229. Id.
230. Id.
231. Id.
232. Id.
233. Id. at 61.
234. Id.
235. Britain did not induce major continental powers, after the 1870s, to retain liberal trade policies. See in Keohane, supra, note 3, at 36. One reason for its "relative ineffectiveness in maintaining a free trade regime is that it had never made extensive use of the principle of reciprocity in trade. It thus had sacrificed potential leverage over other countries that preferred to retain their own restrictions while Britain practiced free trade. the policies of these states might well have been altered had they been confronted with a choice between a closed British market for their exports on the one hand and mutual lowering of barriers on the other." Id. at 37.
236. Friedman W, O.J. Lissitzyn & R.C. Pugh, International Law, St Paul, Minn. West Publishing Co. (1969), at 1075
237. Dam, supra, note 204, at 12. Keohane writes that "... international regimes (...) are rarely if ever instituted by disinterested idealists for the sake of the common good. Instead, they are constructed principally by governments whose officials seek to further the interests of their states (as they interpret them) and of themselves. They seek wealth and power, and perhaps other values as well, no matter how much they may indulge in rhetoric about global welfare or a world "safe for interdependence"." In Keohane, supra, note 3, at 22.

238. See Jackson, supra, note 79, at 36-37
239. Id. at 36.
240. Id.
241. Id. On the connection between protectionism and war, see supra, Introduction, §4.
242. Id.
243. Friedman, supra, note 236, at 1075
244. Id.
245. Id. 12 ; these objectives were the same as the ones outlined in the code of conduct elaborated by American and British trade experts who met in 1943 in a joint seminar for the purpose of drawing what should be the trade rules after the war. The experts also agreed that these objectives should be cast in detailed legal obligations that would allow no evasion ; see R.E. Hudec, The GATT Legal System and World Trade Diplomacy, New York, Praeger Pub. (1975), at 13.
246. Dam, supra, note 204, at 12.
247. Id.
248. Id. at 12-13.
249. Hudec, supra, note 245, at 13.
250. Id.
251. Id.
252. Friedman, supra, note 236, at 1075
253. Id.
254. Id.
255. Dam, supra, note 204, at 14 ; Baldwin, supra, note 208, at 10-11.
256. Id.
257. The GATT was drafted at the Geneva conference, simultaneously with the tariff negotiations and the work on the ITO charter. However, it was intended to be a subsidiary agreement under the ITO charter and to depend upon the ITO charter and the ITO secretariat for

servicing and enforcement. Most of the clauses of the GATT were drawn from comparable clauses drafted for the ITO, and it was understood that most of these GATT clauses would be changed to conform to the corresponding version of the ITO charter that emerged from the later Havana conference. The United States tariff Agreement Authority would expire in the middle of 1948 and it was obvious that an ITO charter would not be in effect by then. Partly for these reasons, the United States and other countries desired to have GATT accepted and implemented as soon as possible. Because some countries would require parliamentary action in order to accept many of the clauses of GATT, the GATT itself was not applied. Indeed, a "Protocol of Provisional Application" was signed in late 1946, by the 22 original members of GATT, and this protocol became effective on January 1, 1948. It is only through this protocol that the GATT is applied. See generally Jackson, supra, note 79, ch. 2.

- 258. Id.
- 259. Id. at 16.
- 260. Dam defines "legalism" as an approach to international agreements under which draftsmen attempt to foresee all the problems that may arise in a particular area and to write down highly detailed rules in order to eliminate to the greatest extent any possible disputes, or even any doubt, about the rights and obligations of each agreeing party under all future circumstances ; see supra, note 204, at 4.
- 261. Id. at 16.
- 262. For a similar point in connection with regimes regarding the environment protection, see generally Note, supra note 2, at 1521.
- 263. Dam, supra, note 204, at 4.
- 264. Id. at 16.
- 265. Id.
- 266. Id.
- 267. Id. at 4.
- 268. Id.
- 269. Id.
- 270. Id.

271. Id. "Les règles de droit sont des limites transactionnelles imposées aux prétentions des pouvoirs individuels et à celles des pouvoirs des institutions ; ce sont des règlements anticipés de conflits." Hauriou, La théorie de l'institution et de la fondation (Essai de vitalisme social), 4 Cahiers de la Nouvelle Journée 89, Paris, Bloud & Gay (1925), at 94.
272. Dam, supra, note 204, at 4-5.
273. Id. at 5.
274. Id.
275. This is so because, as noted by Keohane, "Protection is a way of forcing the costs of adjustment onto others (inside one's country or outside), at least temporarily, and is sought as a shelter from the impact of rapid change with which it is difficult for people to cope." See in Keohane, supra, note 3, at 212.
276. Viravan, et al., Trade Routes to Sustained Economic Growth - Report of a Study Group of the Trade Policy Center, Macmillan Press, for the U.N., London '(1987), at 50.
277. Id.
278. Id. at 28.
279. Id. at 34.
280. Id. at 111.
281. Id. at 44.
282. Id.
283. Id.
284. See supra, note 257.
285. Roessler, The Scope, Limits and Function of the GATT Legal System, 8 World Econ. 287 (1985), at 296.
286. Id. at 295.
287. Id.
288. Id... The Economist's presents the issue bluntly in the following way :

"It ought to be simple : domestic producers should campaign for protection, while exporters and consumers should press for free trade. Politicians would be lobbied by all three, but their unerring instinct for the welfare of their country should lead them towards free trade. As life does not follow such art, the GATT exist." See the issue of April 6, 1991, at 14.

- 289. Viravan, supra, note 276, at 24 ; Tumlir, supra, note 63, at 7.
- 290. Viravan, id.
- 291. Id.
- 292. See id.
- 293. See Tumlir, supra, note 63, at 6-7.
- 294. See id., at 3. Protection only redistributes income and wealth within the economy while reducing it on the whole. While such a cost is difficult to measure, it is a very costly form of redistribution. This difficulty is due to the fact that there are two different kinds of costs: one is borne by the consumers or users ; the other can not be allocated to any particular group, and is borne by practically everybody in the form of reduced productivity in the protected country at large ; id. For a practical example of such a redistribution, and how inefficient it is, see infra, note 379, in the context of the Japanese restraint on the export of automobiles to the United States.
- 295. See supra note 112.
- 296. See supra, Introduction, §0.(3)(ii).
- 297. See generally, A. Downs, An Economic Theory of Democracy, New York, Harper & Row (1957).
- 298. Hayek, supra, note 11, at 93-94.
- 299. Viravan, supra, note 276, at 31.
- 300. Id.
- 301. They are, in a sense, rules of the road, which certainly are at times annoying to follow, but which after all allow us to drive through green lights with relative confidence.
- 302. This is true at the global level where differences in levels of development are such that it prevent a complete harmonization of competition conditions ; see infra, Part

III, §3.1.4.1(3)(i). Among economies at closer levels of economic development, a qualitatively different solution to the problem of differing competition conditions for economic actors is possible, consisting in such an harmonization of competition conditions ; this is what Robert Schuman meant in the context of the European Integration :

"... la compétitivité d'une production dans un pays plus ou moins favorisé par ses richesses naturelles, par sa situation géographique ou démographique, par la qualité de ses institutions politiques, reste (...) capable de variations considérables. C'est pour cela qu'il faut des clauses de sauvegarde pour limiter les risques, lorsqu'on s'engage dans l'épreuve d'une concurrence nouvelle. Il faut égaliser, harmoniser les conditions de la production, les législations, la masse des salaires et des charges, afin que chaque pays participant soit à même de soutenir le libre confrontation avec les autres. Toute communauté viable exige que soient d'abord atténuées, et si possible éliminées, ces différences de situation, afin qu'une industrie ou une production qui n'est plus à l'abri de l'ancien protectionisme ne risque pas d'être écrasée." see supra, note 97, at 105-106.

303. See supra, note 257.

304. Id.

305. Id.

306. See Thurow, as cited by Bhagwati in Multilateralism at Risk - The GATT is Dead, long Live the GATT, 1990 World Econ. 149.

307. See Viravan, supra, note 276, at 30.

308. See Abbott, The Trading Nations Dilemma : the Functions of the Law of International Trade, 26 Harv. Int'l L. J. 501 (1985), at 522.

309. Whereas traditionally the welfare gains and losses that occur to particular groups in society as a result of moves toward free trade or protection are summed to produce a net national result, a public choice approach such as the one used here - seeing the government as mediating between self-interested social groups - focuses not on net national welfare but on redistribution of income. See Abbott, id. at 504.

310. Roessler, supra, note 285, at 297.

311. See Jackson & Davey, supra, note 68, at 367.

- 312. Id. at 296 ; See also O. Long, Law and Its Limitations in the GATT Multilateral Trade System, Dordrecht, Nijhoff (1985), at 10.
- 313. Abbott, supra, note 308, at 521. In the absence of effective rules, governments are not so much protectionist as helpless ; e.g. Tumlrir, Need for an Open Multilateral Trade System, 6 World Econ. 393 (1983) at 403.
- 314. See id. at 522-525. See also A. Oxley, The Challenge of Free Trade, Harvester Wheatsheaf, 1990, at 5.
- 315. Viravan, supra, note 276, at 30.
- 316. Roessler, supra, note 285, at 296.
- 317. Id. at 295.
- 319. Id.
- 319. Id. at 296.
- 320. Id.
- 321. Roessler, The Rationale for Reciprocity in Trade Negotiations Under Floating Currencies 31 KYKLOS 258 (1978), at 264-265.
- 322. Abbott, supra, note 308, at 502 ; Cassese, supra, note 125, at 13.
- 323. Id.
- 324. Viravan, supra, note 276, at 32.
- 325. Id.
- 326. Id.
- 327. Id.
- 328. See generally id.
- 329. Id. at 27.
- 330. Id.
- 331. See Strange, supra, note 4, especially at 165.
- 332. The GATT's review of the European Community's trade policies, released on April 16, 1991, finds that the Community has been pursuing highly discriminatory

policies. It complains that the European Community has put in place a set of preferential trading arrangements and built up a network of bilateral agreements with other countries, which introduces "strong elements of discrimination" into the multilateral trading system. GATT points to the lack of a statutory independent body at the Community level to act as a watchdog in trade matters. Therefore, when policies are formulated, the system under which the Commission proposes and the Council disposes favors sector-specific views against overall economic or trade considerations. Coal, steel, cars and semi-conductors are cited as examples of the Communities penchant for pursuing individual industries' interests separately. EC textile and clothing manufacturers are shielded by 19 bilateral agreements under the Multi-Fiber Arrangement and by "self-restraint" deals with exporters in Mediterranean countries. The GATT considers that the value of the Community's tariff bindings (at a trade weighted average of 5.1 per cent) has been eroded by the propensity to strike bilateral agreements targeted against the most competitive foreign suppliers among its trading partners. The accords tend to become entrenched and delay more than they promote structural adjustment in the industries concerned ; e.g. The Financial Times, issue of April 17, 1991. Additionally, the European Community rarely uses the safeguard action allowed by GATT under the Escape clause of Article XIX ; see infra, Part III, §3.2.2.1(3). The European Community's tendency to bring dozens of antidumping actions against foreign exporters whose main crime seems to be selling goods at prices which European producers can not match has also been criticized ; see, for example, The Wall Street Journal Europe, May 15, 1991, GATT Chief Scolds, Pleads In Bid to End Trade Impasse.

333. See supra at §1.2.1.3. In J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 72 L. Ed 624, 48 S Ct 348, the Supreme Court determined that the powers conferred upon Congress to lay and collect taxes, duties and imports, and to regulate commerce with foreign nations may be used for the protection of American industries. The Supreme Court pointed out that one of the chief purposes behind the imposition of customs duties on articles of imported merchandise is the equalization of the difference between the cost of producing in a foreign country the articles in question and laying them down for sale in the United States and the cost of producing and selling like or similar articles in the United States, so that the duties not only secure revenue but at the same time enable domestic producers to compete in the American market on terms of equality with foreign producers. As long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit

of the general government, the existence of other motives in the selection of the subject of taxes cannot invalidate congressional action.

- 334. See generally G.C. Hufbauer, D.T. Berliner & A/E/ Kimberly, Trade Protection in the United States - 31 Case Studies, Wash., D.C., Institute for International Economics (1985), at 1.
- 335. See Slot, supra, note 194.
- 336. Jackson, supra, note 79, at 209-210.
- 337. U.S. Const., Art. 1, Section 8.
- 338. U.S. Const., Art. 2, Section 2. However, the Supreme Court has generally held the authority of Congress to be preeminent whenever presidential actions have conflicted with acts of Congress.
- 339. Hufbauer, Berliner & Kimberly, supra, note 334, at 6. The industries involved are Benzenoid Chemicals, Rubber Footwear, Ceramic Articles and Tiles, Glassware, Canned Tuna, Textiles and Apparels and Orange Juice.
- 340. Id.
- 341. Id.
- 342. Id.
- 343. Id. at 9.
- 344. See generally Jackson & Davey, supra, note 68, at 538-609 ; see Finger, Keithall & Nelson, The Political Economy of Administered Protection, 72 Am. Eco. Rev. 452 (1982), at 452.
- 345. See supra, §1.3.1.
- 346. Id.
- 347. Jackson, supra, note 79, at 240-241.
- 348. See infra, §1.3.3 (2)(i).
- 349. Hufbauer et al., supra, note 334, at 7.
- 350. Id.
- 351. Id.
- 352. Finger et al., supra, note 344, at 464-465.

353. Id. at 453.

354. Id. at 465.

355. Id. Hudec remarks that :

"In any market economy, the private owners of firms injured by foreign competition will normally seek governmental protection when the competition becomes damaging. International economic competition has intensified in the 1970s. Domestic producers have responded with mounting demands for protection. The numerous complaints with foreign dumping and subsidies illustrate this protectionist trend. (...) The "unfairness" rationale appears to offer advantages at several levels. At the simple business level, the firm's managers do not have to admit competitive failure. (...) At the political level, the managers can obtain relatively greater attention from legislators... Third, at the legal level, once a particular practice has been defined as "unfair", trade laws typically grant relief at a much lower threshold of injury to domestic industry. Moreover, the relief is mandatory and remains in effect so long as the unfair practice continues. Fourth, on the international level, compensation is not due, nor is the international reaction as severe, when the trade being restricted can be shown to be dumped or subsidized." See in Hudec, R.E., "Interface Revisited : "Unfair Trade" Policy after the Tokyo Round", in Interface Two : Conference Proceedings on the Legal Framework of East-West Trade (Wallace & Flores eds. 1982), at 20-21.

356. Finger et al., supra, note 344, at 454.

357. Id.

358. Id. at 453.

359. Id. at 454.

360. Id. at 453.

361. Id. at 454.

362. Id.

363. Id.

364. Id.

365. Id. at 455.

- 366. Id. at 454.
- 367. Id. at 455.
- 368. Id.
- 369. Id. at 454.
- 370. Id.
- 371. Id.
- 372. Id. at 465.
- 373. Id.
- 374. Hufbauer, Berliner & Kimberly, supra, note 334, at 8.
- 375. Recent examples being the "Voluntary Restraint Agreement" to limit steel shipments from Brazil, Korea, Spain, Japan, etc ... and the auto restraints concerning Japanese car exports. See infra note 379.
- 376. Hufbauer, Berliner & Kimberly, supra, note 334, at 10.
- 377. Id.
- 378. Id.
- 379. Id. at 10. A very instructive case in this respect is the one concerning the birth, life and consequences of the Japanese restraints on exports of automobiles in the United States from 1981 to 1985. The American automobile industry faced difficult economic times in the late 1970s. It first attempted to obtain protection from import competition by petitioning the International Trade Commission which, in 1980, made a negative determination (Certain Motor Vehicles, Inv. No. TA-201-44, Pub. No. 1110, 2 ITRD 5241 (ITC 1980)). The American automobile industry then used the political track : legislation was introduced in Congress to authorise a Voluntary Restraint Agreement in the car sector and to impose quotas on automobile imports. This would have been a violation of GATT. However, no legislative action was taken ultimately because an "exchange of views" between the US and Japanese governments (US officials denied that there was "negotiation") led to a proper understanding of their interests by the Japanese. In a letter dated May 7, 1981 to US Attorney General Smith, Japanese ambassador Okawara wrote : "I have the honor to inform you that the Government of Japan, through explanations by the United States Government fully understands the difficult situation of the U.S. auto industry. Based upon the above understanding, the Government of Japan will unilaterally

restrain the volume of cars to be exported from Japan to the U.S (...) The above-mentioned measures (...) will be put into practice through written directives setting the maximum number of exportable units of passenger cars to the U.S. for each Japanese automobile company, to be given by MITI (...) The Government of Japan considers that the implementation of such an export restraint by the Government of Japan (...) would not give rise to violations of American antitrust laws. However, the Government of Japan requests that the Department of Justice (...) supports the view of the Government of Japan". On that same May 7, 1981, Attorney General Smith replied : "... we believe that the Japanese automobile companies' compliance with export limitations directed by MITI would properly be viewed as having been compelled by the Japanese government, acting within its sovereign power. [This] would not give rise to violations of United States antitrust laws." There may not have been a technical violation of US antitrust laws, but obviously the restraint on competition resulting from the "understanding" led to the exact same consequences for American consumers. A study of the staff of the Federal Trade Commission concluded in 1984 that the restraints were costing consumers at least \$1.1 billion (in 1983 dollars) annually in higher prices and the economy as a whole some \$994 million annually in efficiency and other losses. The study estimated that the Japanese auto producers obtained benefits in an amount of \$824 million while American producers' gains were estimated at \$115 million. When the restraints expired on March 31, 1985, the United States did not request their renewal. What is more appalling is that the restraints have only delayed the inevitable : the American auto industry is still loosing ground to the Japanese one. The irony of the restraints is that the benefits to the Japanese industry were more than 7 times those of the US industry... With the monopoly rents reaped, the Japanese industry has been able to invest and can now give a hell of a hard time to the American industry. On this issue, see generally Jackson & Davey, supra, note 68, at 619-622 ; see also Oxley, supra, note 314, at 47. The difficulties faced today by the European car industry due to Japanese competition are leading to the exact same attempts by the European industry to get protection. An agreement restraining Japanese car exports in Europe was signed in August 1991 ; it will have the exact same consequences as the 1981-1985 restraints in the United States : consumers will pay a huge bill ; the efficiency of the economy will be greatly reduced ; Japanese will get monopoly rents ; European producers of cars will not get incentives to produce better cars ; ultimately, the problems faced by the industry will be worse than at the outset, and the cost of adaptation will be even more expensive than if it were faced today. See infra, Part III, §3.2.2.1(2).

- 380. Id. at 20.
- 381. Id.
- 382. Id. t
- 383. Id. at 16, 20.
- 384. Id. at 20.
- 385. See Roessler, supra, note 285, at 297.
- 386. Id.
- 387. Id.
- 388. Hudec, supra, note 202, at 188.
- 389. Roessler, supra, note 285, at 297-298.
- 390. On these birth defects, see supra, note 258.

PART II

1. See supra, Part I, §1.1.2.
2. See supra, Part I, §1.1.2.
3. Id.
4. See supra, Introduction, §3.(2).
5. See supra, Part I, §1.1.3.
6. See supra, Part I, note 57.
7. See Lenaerts, Constitutionalism and the many Faces of Federalism, 38 Am. J. Comp. L. 205 (1990), at 205.
8. See supra, Part I, §1.2.2, §1.3.1 & §1.3.2.
9. See supra, Part I, §1.2.1.3.
10. See Trubek, "Consumer Law, Common Markets and federalism : Introduction and General Concepts", in "Consumer Law, Common Markets and Federalism in Europe and the United States" 1 (T. Bourgoignie & D. Trubek eds.) vol. 3 of Integration through Law - Europe and the American federal Experience, Berlin, de Gruyter, (M. Cappelletti, M. Secombe & J. Weiler general eds. 1987), at 13, who speaks in the context of legal regimes of consumer protection.
11. Id. at 15.
12. See generally supra, Part I, §1.1.1 ; see also infra, note 11a and accompanying text.
13. See Lenaerts, supra, note 7, at 206.
14. See Hayek, Part I, ft. 112. In the United States context, see, Collins, Economic Union as a Constitutional Value, 63 N.Y.U. L. Rev. 43 (1988) at 63.
15. See The Economist's, June 23, 1990, at 11.
16. See supra, Part I, §1.1.3.

17. This is the essence of constitutionalism : the government is limited under the rule of law. It is limited by the fulfillment of its function, which is the preservation of the common good ; it is limited by the rule of law because it is effective procedures which ensure that the government effectively does nothing else but preserving the common good.
18. See Trubek, supra, note 10, at 19.
19. Id.
20. See supra, Introduction, §0.
21. Id. 14.
22. Id.
23. DeAnne Julius, for example, notes that "there is a theoretical possibility that pressures in favor of policy convergence will drive the level of regulation so low that the foundations of the market itself are undermined." in Global Companies and Public Policy - The Growing Challenge of Foreign Direct Investment, The Royal Institute of International Affairs, Pinter Publishers, 1990, at 94.
24. See infra, §2.2.
25. Redish & Nugent, The Dormant Commerce Clause and the Constitutional Balance of Federalism, 1987 Duke L. J. 569, at 591.
26. U.S. Const. art.I, §10, cl. 1.
27. Redish & Nugent, supra, note 25, at 591. The United States, even though created by sovereign states, therefore contains some components of devolutionary federalism, i.e. of a constitutional order that redistributes the power of a previously unitary State among its components units ; see Lenaerts, supra, note 7, at 206.
28. See id., at 591-593.
29. Article I, section 8 of the US Constitution reads as follows :
 - [1] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States ; but all Duties, Imports and Excises shall be uniform throughout the United States ;
 - [2] To borrow money on the credit of the United States ;

- [3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes ;
- [4] To establish a uniform Rule of Naturalization, and Uniform Laws on the subject of Bankruptcies throughout the United States ;
- [5] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the standard of Weights and Measures ;
- [6] To provide for the punishment of counterfeiting the Securities and current Coin of the United States ;
- [7] To Establish Post Offices and Post Roads ;
- [8] To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries ;
- [9] To constitute Tribunals inferior to the Supreme Court ;
- [10] To define and punish Piracies and Felonies committed on the High Seas, and Offenses against the Law of Nations ;
- [11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water ;
- [12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years ;
- [13] To provide and maintain a Navy ;
- [14] To make Rules for the Government and Regulation of the land and naval Forces ;
- [15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions ;
- [16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the Discipline prescribed by Congress ;
- [17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings ; And
- [18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

30. U.S. Const. art VI, cl. 2, reads as follows :

"[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ; and all treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land ; and the Judges in every States shall be Bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding ;"

31. Redish & Nugent, supra, note 25, at 592.

32. U.S. Const., art. I, Section 8, cl. 8.

33. Trubek, supra, note 10, at 16.

34. G. Gunther, Constitutional Law, Mineola, NY, The Foundation Press, Inc. (9th ed., 1975), at 127.

35. Id.

36. Id., especially at 127-128.

37. See generally, Laycock, Note on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Right, 99 Yale L. J. 1711 (1990), at 1735-1738.

38. See Weil, De l'Etat minimal à l'Etat progressiste - 1890-1920, in "L'Etat en Amérique", 76, Presses de la Fondation Nationale des Sciences Politiques (A. Toinet ed., 1989), at 79.

39. Laycock, supra, note 37, at 1735.

40. See McCloskey, The American Supreme Court, Chicago, the U. of Chicago Press (1960), at 102.

41. Id. at 103.

42. Id. at 104.

43. Id. at 104-105.

44. Id. at 144.

45. Id. at 144-145.

46. See id. at 127.

47. See Laycock, supra, note 37, at 1735-1736.

48. McCloskey, supra, note 40, at 165-166.

49. Id. at 178.
50. Gunther, supra, note 34, at 127 and 181.
51. Collins, supra, note 14, at 53.
52. Id.
53. Id.
54. Id. at 54.
55. P.J. Slot, Technical and Administrative Obstacles to Trade in the EEC, Leyden, A-W Sijthoff (1975), at 153.
56. See Lenaerts, supra, note 7, at 224. The European Community is thus an example of devolutionary federalism (as opposed to integrative federalism, see supra, note 27), i.e. of a constitutional order that strives at unity in diversity among previously independent or confederally related component entities ; see id. at 206.
57. Id. However, any measure designed to achieve one of the objectives of the common agricultural policy must be based on Art. 43 ; the same is true in the field of transportation, with Art. 75. Article 100 is more relevant for our purposes, which are to present the procedures and instruments used for the removal of non-tariff barriers. Article 235 also provides a general basis for the adoption of Community acts, but - as Article 100 - it requires unanimity. Article 235 reads :

"If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures."
58. Slot, supra, note 45, at 153.
59. Article 189 of the Rome Treaty provides that :

"In order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions.
A regulation shall have general application. It shall be binding and directly applicable in all Member States.
A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and method."

A decision shall be binding in its entirety upon those to whom it is addressed.
Recommendations and opinions shall have no binding force."

60. See Lenaerts, supra, note 7, at 211 ; however, in some instances, the European Court of Justice may recognize a direct effect to provisions of a directive ; e.g. case No. 41-74, December 4, 1974, Van Duyn, Rec. 1974, 1348, at 1350.
61. Slot, supra, note 55, at 66.
62. Ehlermann, The Internal Market Following the Single Act, 24 Common Mkt L. Rev 361 (1987), at 367. The internal market is defined as comprising "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."
63. Id. at 381.
64. Id. at 386.
65. Id.
66. See E. Rhebinder & R. Steward, "Environmental Protection Policy", vol. 2 of Integration through Law - Europe and the American Federal Experience, Berlin, de Gruyter (M. Cappelletti, M. Secombe & J. Weiler, general eds. 1985), at 44.
67. But American Courts have never really settled on a rationale for their frequently exercised power to held state regulation of commerce unconstitutional ; see Blasi, "Constitutional Limitations on the Power of States to Regulate the Movement of Goods in Interstate Commerce", in 1 Courts and Free Markets - Perspectives from the United States and Europe, 174, Oxford, Clarendon Press (T ; Sandalow & E. Stein eds. 1982), at 175-176 ; See Regan, The Supreme Court and State Protectionism : Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091 (1986) for an argument that the Commerce Clause is the best textual basis for a power deriving mostly from the structure of the Constitution.
68. Rhebinder, supra, note 66, at 44.
69. Collins, supra, note 14, at 43.
70. Regan, supra, note 67, at 1111.
71. Collins, supra, note 14, at 44.

72. Id. at 51.
73. U.S. Const. art I, §10, cl.2.
74. Id. cl.3.
75. Id. art. IV, §2, cl.1.
76. Collins, supra, note 14, at 51.
77. Blasi, supra, note 67, at 175.
78. Id.
79. Id.
80. Holmes, Collected Legal Papers, 295-296, New York (Harcourt, Brace & Howe, 1920), as cited by Kommers & Waelbroeck, "Legal Integration and the Free Movement of Goods : the American and European Experience", in Integration through Law - Europe and the American Federal Experience, vol. 1, Book 3, 165, de Gruyter, Berlin (M. Cappelletti, M. Secombe & J. Weiler, general eds. 1986), at 171.
81. Id.
82. See Gibbons v. Ogden, 22 U. S. (9 Wheat.) 1 (1824).
83. Id. As Professor Regan writes it, this decentralized structure of government is welcomed because many of the same considerations that argue for a centralization of power - the complexity and pervasiveness of modern economic activity - argue strongly against treating the central authority as exclusive ; Regan, supra, note 67, at 1112.
84. Kommers & Waelbroeck, supra, note 80, at 171-172, who indicatively cite six areas : (1) Advertising ; (2) Sale of goods on consignment which move in interstate commerce but are sold exclusively intra-state ; (3) Food inspection ; (4) Quarantine laws ; (5) State game protection ; (6) Where the state acts as a buyer of goods in commerce ; see id. for the references to the cases.
85. See id. at 172.
86. Id.
87. Id.
88. Collins, supra, note 14, at 61
89. Id.

90. Id.
91. Trubek, supra, note 10, at 19.
92. 22 U.S. (9 Wheat.) 1 (1824).
93. Kommers & Waelbroeck, supra, note 80, at 172.
94. 53 U.S. (12 How.) 299 (1851).
95. Kommers & Waelbroeck, supra, note 80, at 173.
96. Id.
97. Id.
98. See id. at 173-174, citing the dissenting opinion of Justice Stone in *DiSanto v. Pennsylvania*, 273 U.S. 34, 44 (1927).
99. Id. at 174.
100. Id.
101. Blasi, supra, note 67, at 185.
102. Id.
103. See generally, Regan, supra, note 67, at 1101-1108.
104. Id. at 1102-1103.
105. Id. at 1102.
106. Or. App., 517 P. 2d 691 (1973).
107. Id. at 1105-1108.
108. 397 U.S. 137 (1970).
109. 397 U.S. 137, 142 (1970).
110. Regan, Supra, note 67, at 1108.
111. See id. at 1136-1137. However, if for one reason or another, the court's ability to ascertain legislative purpose is distrusted, or if it is thought that inquiry into purpose is improper for some reason, then protectionist effect balancing might be recommended as a rule of decision that would approximate the results of successful inquiry into purpose while avoiding some of the attendant problems ; Id. at 1106.

112. Id. at 1125-1126.
113. Id. at 1126.
114. For more details, see generally Regan, supra, note 67.
115. Regan, supra, note 67, at 1127.
116. Id. at 1118 ; emphasis added.
117. Id.
118. Id. at 1130.
119. The statute was upheld in American Can Co. v. Oregon Liquor Control Comm., 15 Or. App. 618, 517 P.2d 691 (1973).
120. e.g., Regan, supra, note 67, at 1116-1117.
121. Id. at 1118.
122. Id.
123. And, generally speaking, any form of multi-state economic integration.
124. Regan, supra, note 67, at 1118.
125. Id. at 1177.
126. Id. at 1146-1147.
127. Id. at 1147.
128. Id.
129. Id.
130. Id.
131. Id. at 1148.
132. See generally, Collins, supra, note 14, at 68.
133. See supra, part I, §--.
134. Cost exporting legislation is damaging to a decentralized structure of government because it is not bound by local political restraint. See Collins, supra, note 14, at 66-67. In South Carolina State Highway Department v. Barnwell Bros., 303 U.S. 177 (1938), Justice Stone's opinion for the United States Supreme Court said that the Commerce clause prohibits state legislation that "by its

necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state." Id. at 186 "[W]hen the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." Id. at 185.

135. T. Sandalow & E. Stein, supra, note 67, at 24.

136. Id.

137. Id. at 24-25.

138. However, Sandalow & Stein warned that the cases were plainly too few in number to permit a judgment about the depth of the European Court of Justice's commitment to the principle of integration. They noted further that on the cases cited in support of the claim that the Court applies an "integration" principle, those involving import and export licences may be explained by the risk there was that the licence requirements might come to be administered in a way that would serve to protect the market. As to the industrial property cases, the Court's concern may have been the distortion of competition as much as the free movement of goods ; id. at 26.

139. The only real contender as a test of constitutionality of texts restricting inter-state trade opposed to the motive review test ; see supra, notes 107 to 109 and accompanying text.

140. See Part I, ft. 96.

141. Regan, supra, note 67, at 1179.

142. See Seidl-Hohenveldern, International Economic Law 198 R.C.A.D.I.9 (1986), at 14.

143. All customs duties on imports or exports between member states are prohibited ; the same applies to "charges having equivalent effect" (Article 9).

144. e.g. Schermers, "The Role of the European Court of Justice in Free Movement of Goods", in 1 Courts and Free Markets - Perspectives from the United States and Europe, 222 (T. Sandalow & E. Stein eds. 1982), at 225. In the Administrative fees in Germany case, the Court decided that "any pecuniary charge however small and whatever its designation and modes of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge

having equivalent effect within the meaning of Article 9, 12, 13 and 16 of the Treaty, even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect, and if the product on which the charge is imposed is not in competition with any domestic product" ; joined cases 52 & 55/65 (1966) ECR 159, 169.

145. L.M. Gormley, prohibiting Restrictions on Trade within the EEC, North-Holland (1985), at 2.
146. For the text of Article 36, see supra, Part I, note 96 ; for a discussion on Article 36, see infra, §2.2.2.5.
147. Case 8/74 (1974) CLR 837, 852.
148. According to Gormley, however, in this case "the discrimination criterion was firmly rejected in favor of the central importance of the actual or potential, direct or indirect effect on trade between member States" , cf. Gormley, supra, note 145, at 22, emphasis added ; for Gormley, the Court "demonstrated that the crucial question is whether a measure is capable of hindering trade between Member States", id. at 72, emphasis added. We obviously dissent.
149. First, a remark on terminology : when the Court uses the expression "discrimination", it normally does it to designate "open discrimination". We will use it in the broader sense encompassing open and hidden discrimination. On the substantive level now, Marenco has proposed a unitary reading of the case law of the European Court of Justice regarding our issue to which we generally subscribe ; see generally Marenco, Pour une interprétation traditionnelle de la notion de mesure d'effet équivalent à une restriction quantitative, 20 Cahiers D. Eur. 291 (1984). According to Marenco, "la piste à explorer est (...) que le noyau du concept de mesure d'effet équivalent serait l'idée de discrimination, soit que la discrimination soit directement constatée, soit que le défaut d'une constatation directe soit suppléé par d'autres éléments révélant, de manière indirecte, l'existence d'une forme subtile de discrimination." See at 304.
150. case 231/78, Commission v. United Kingdom (1979) ECR 1447 ; case 232/78, Commission v. France (1979) ECR 2729 ; case 53/76, Bouhelier (1977) ECR 197 ; case 95/81, Commission v. Italy (1982) ECR 2187 ; case 132/80, United Foods etc v. Belgium (1981) ECR 995.
151. For a similar approach, see generally Marenco, supra, note 149.
152. F. Burrows, Free Movement in European Community Law, Oxford, Clarendon Press (1987), at 52.

153. Contra, Gormley, supra, note 145, at 96.
154. Case 15/79, P.B. v. Produktshap voor Vee en Vlees (1979) ECR 3409.
155. As in the case 53/76, Procureur de la République de Besançon v. Bouhelier et al. (1977) ECR 197, where the Court struck down a French measure according to which exporters of watches were required to obtain a licence for their exportation, unless covered by a specified technical standard.
156. The Court ruled that Article 34 "concerns national measures which have as their specific object the restriction of patterns of export and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the State in question at the expense of the production or of the trade of other Member States." Case 15/79 (1979) ECR 3409, 3415.
157. Case 15/79 (1979) ECR 3405, 3416 ; emphasis added.
158. Another case where the Court fortunately rejected the effect-on-trade test is the Oebel case. Mr. Oebel was charged, in Germany, with having his employees engaged in the production of bread working at night, contrary to a provision in German law. Mr. Oebel counter-attacked by saying that Germany was the only Member State with such prohibition ; that the law prevented fresh bread from being delivered in neighbouring Member States in time for sale in the early morning ; that - therefore - the German legislation was an unjustified discrimination and a restriction on competition within the Community... The Court answered that do not fall under the prohibition of Article 34 rules regulations "...which are part of economic and social policy and apply by virtue of objective criteria to all the undertakings in a particular country which are established within the national territory without leading to any difference in treatment whatsoever on the ground of the nationality of traders and without distinguishing between the domestic trade of the state in question and the export trade."
159. For example, Gormley, supra, note 145.
160. Id. at 102. Gormley acknowledging that the case law under Article 34 is "correct in its results", is then forced to the logical conclusion that the Court has to be "somewhat perverse in its reasoning" ; Gormley, id. The Court has no perverse reasonings. They are such only if one wants a priori the Court to apply an effect-on-trade criterion, which is what Gormley thinks the court is applying in Article 30 cases.

161. According to G. Marenco, "La notion de mesure d'effet équivalent à une restriction quantitative ne peut qu'être fondamentalement la même, tant lorsqu'elle s'applique à l'importation, que lorsqu'elle s'applique à l'exportation" ; see in Marenco, supra, note 149, at 301.
162. See Marenco, supra, note 149, at 303.
163. See supra, note 147.
164. Case 8/74 (1974) ECR 837, 852.
165. This is the so-called lacunae issue, in the terminology used by those considering that the actual solution of centralized/decentralized regulation is only transitory ; see, for example, Gormley, supra, note 145, at 3. However, we do not think there is a lacunae here, but a systemic problem necessarily faced in a multi-state economic integration.
166. The Dassonville case, used by the protectionist effect doctrine in support of its theory is an odd case. It arose out of the prosecution of an importer of Scotch whisky, practicing parallel imports from France to Belgium. The importer did not possess the appropriate British customs documentation which would have provided the certification of origin required by the Belgian authorities, and it had falsified it. Although it would have been easy for a direct importer to obtain the certification of origin, it was in fact extremely difficult for an indirect importer to obtain such certificate. In addition to the criminal proceedings, the importer faced a civil claim for damages from the two firms which held the exclusive concession for Belgium for the brands of whisky involved. Therefore, the Court was faced with two related questions : one as to the effect of the Belgian law ; and one as to the effect of the exclusive distributorship agreement. In Dassonville, we submit here that the Court was militant in its interpretation because of the oddness of the case. The Dassonville case is a parallel importation case ; and the promotion of parallel imports is quite an efficient way of preventing private parties from partitioning the market - prevention that the Court is eager to ensure. The Belgian rules on certificate of authenticity were not directed at helping a prevention of parallel imports. However, without the militantism of the Court, they would be too easy to use for private parties willing to reduce competition in the Common market. Odd cases make bad law, and the Dassonville case is more important for the broadness of the judicial review it proclaims than for its a-typical test. See also Marenco, supra, note 149, at 318-321.

167. Case 113/80 (1981) ECR 1625.
168. Nor could the Irish government rely on Article 36 because the same grounds were not listed in that Article. Then the Court turned to the application of Article 30 to the facts and said, after reciting an Irish argument to the effect that there was in fact no discrimination and the Commission's contention that there was : "It is therefore necessary to consider whether the contested measures are indeed discriminatory or whether they constitute discrimination in appearance only. "The Court decided that there was discrimination and therefore a breach of Article 30.
169. Marenco, supra, note 149, at 303-304.
170. Burrows, supra, note 152, at 56.
171. In the case 35/76, Simmenthal (1976) ECR 1871, the Court of Justice held that : "Article 36 is not designed to reserve certain matters to the exclusive jurisdiction of member states but permits national laws to derogate from the principle of the free movement of goods to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to in that Article." See case at 1886.
172. Case 4/75 (1975) ECR 843.
173. Hence, in the de Peijper case, 104/75 (1976) ECR 613, the Court wrote that : "Health and the life of humans rank first among the property or interest protected by Article 36 and it is for the Member States, within the limits imposed by the Treaty, to decide what degree of protection they intend to assure and in particular how strict the checks to be carried out are to be. Nevertheless, it emerges from Article 36 that national rules or practices which do restrict imports of pharmaceutical products or are capable of doing so are only compatible with the treaty to the extent to which they are necessary for the effective protection of health and life of humans. National rules or practices do not fall within the exceptions specified in Article 36 if the health and life of humans can as effectively be protected by measures which do not restrict intra-Community trade as much." See case at 635, emphasis added.
174. As said in Bauhuis, 46/76 (1977) ECR 5, "... this provision constitutes a derogation from the basic rules that all obstacles to the free movement of goods between Member States shall be eliminated and must be interpreted strictly..." After the "Cassis de Dijon" case, some could believe that the Court was now extending its

interpretation of Article 36. In any case, such was the understanding of the Irish government when, in the Commission v. Ireland case, it tried to defend restrictions on intra-Community trade it had created on the ground that they were justified by consumer protection and the maintaining of fairness in commercial transactions. The Court held, however, that the Irish government was mistaken in relying on Article 36. That Article constitutes a derogation to the basic rule of free movement, and the exceptions listed in it could not be extended. Those exceptions did not include protection of consumer or fairness of commercial transactions.

175. The word "exceptions" is the one used by the Court itself in the case 113/80, Commission v. Ireland (1981) ECR 1625, 1639, to describe the principles it had created in the cases to which it referred, the first of them being the case 120/78, Rewe-Zentral AG v. Bundersmonopolverwaltung fur Brabbtwein (1979) ECR 649, Commonly known as the "Cassis de Dinon" case.
176. Case 120/78 (1979) ECR 649, 662.
177. As to the extent of state powers, the Court wrote :
"Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer." Case 120/78 (1979) ECR 649, 665.
178. According to Marenco :

"... les règles du traité n'ont pas pour but (...) d'interdire les réglementations des Etats membres en tant que telles, afin de parvenir à l'uniformité de ces réglementations par leur simple suppression. Ces règles se préoccupent des effets que ces réglementations exercent de manière spécifique sur les échanges entre Etats membres, non pas de l'effet restrictif général, qui est propre à toute réglementation, du seul fait de son existence, et qui affecte, de manière générale, la liberté économique privée." In Marenco, supra, note 149, at 318-319, emphasis in original.
179. As it did subsequently.
180. See supra, §2.2.2.5.

181. In conclusion to his study, Marengo writes :
- "L'étude entreprise montre que la libre circulation des marchandises organisée par le traité de Rome est, comme les autres libertés, une expression du principe de non-discrimination ; et que tel est le fondement de la notion de mesure d'effet équivalant à une restriction quantitative". In Marengo, supra, note 149, at 349.
182. Case 113/80 (1981) ECR 1625.
183. Case 120/78, Rewe (1979) ECR 649 ; case 788/79, Gilli (1980) ECR 2071 ; case 130/80, Kelderman (1981).
184. Case 113/80 (1981) ECR 1625, 1639 ; emphasis added.
185. Id. ; emphasis added.
186. Id. at 1640 ; emphasis added.
187. Id. ; emphasis added.
188. According to Gormley, because the Court had already concluded that the measure did have an effect on trade between Member States - which was not in dispute -, it pronounced itself on the discrimination issue only out of deference to the Irish government's point... see Gormley, supra, note 145, at 265.
189. Sandalow & Stein, supra, note 67, at 27 ; emphasis added.
190. See supra, notes 119 to 125 and accompanying text.
191. Case 302/86, Commission v. Denmark (1988), under no.2.
192. Making reference to the cases 120/78, Rewe (1979) ECR 649, and 261/81, Rau (1982) ECR 3961.
193. Case 302/86 (1988) under no.6.
194. Mentioning the case 240/83, Association de défense des brûleurs d'huiles usagées (1985) ECR 531.
195. Case 302/86 (1988) under nos. 8-9.
196. Case 302/86 (1988), Submissions and Arguments of the Parties, at 5.
197. Id.
198. Id.
199. Case 240/83 (1985) ECR 531.

- 200. Case 302/86 (1988) under no.13.
- 201. Id. under no.12.
- 202. Id. under no.13.
- 203. Id. under no.20.
- 204. Id. under no.16.
- 205. See supra, note 138.
- 206. Case 302/86 (1988) under no.21.
- 207. Id.
- 208. States can have individual policies only as long as there is no legally valid Community action. When the Community adopts rules designed to protect public policy, public health, and the other matters mentioned in Article 36 - as well as the ones falling under the so-called "rule of reason" - these rules are prima facie exhaustive and so, unless they specifically provide otherwise, there is no longer any room for national measures. If the Community rules take the form of a harmonization directive under Article 100, national rules can not go beyond what is permitted by, or necessary to give effect to, the directive ; see Burrows, supra, note 152, at 63.

PART III

1. Jacquemin and Schrans remark that : ,

"... notre économie de marché suppose l'existence d'institutions juridiques optimales qui assurent son épanouissement. Parmi les conditions ... qui sont requises ... peuvent être évoquées :

A) En général, un bien n'acquiert une utilité économique, ou encore une chose ne se convertit en bien, que grâce aux droits qu'on a sur elle. Ainsi, une certaine forme de propriété est à la base des échanges. Cette propriété confère, en effet, un contrôle du bien ou du service ... Elle assure la possibilité d'exclure jusqu'à un certain degré l'utilisation par autrui. En outre, elle comporte le droit d'être transférée ou échangée. Plus les principes d'exclusivité et de transférabilité de la propriété d'un bien sont stricts, plus la valeur marchande de ce bien tendra à être élevée. A la limite, le véritable bien est moins la chose que les droits eux-mêmes. (...) Le fait que la valeur marchande des biens ou des services tend à croître avec le degré de protection par les droits de propriété est donc une importante motivation pour rechercher un système légal qui assure semblable protection ou qui facilite le passage d'un droit d'usage à un droit de propriété. (...)

B) Un autre fondement de l'économie de marché est la liberté contractuelle. Cette liberté traduit une décentralisation du processus législatif, comme il y a décentralisation de la décision économique. ... les conventions légalement formées tiennent lieu, en effet, de loi à ceux qui les ont faites. (...)

C) Le régime de responsabilité patrimoniale assure, lui aussi, le cadre de l'économie de marché. (...) Monnaie et crédit, brevets, propriété privée, liberté contractuelle, responsabilité patrimoniale, tout est déterminant pour la réalisation d'un système de prix destiné à être un fidèle indicateur de rareté." See in A. Jacquemin & G. Schrans, Le Droit Economique, Paris, P.U.F. (1982, 1ère ed. 1970), at 11-14.

The definition and enforcement of property rights, the enforcement of contracts and the recognition of patrimonial liability is usually made by state norms and through state institutions. The definition and enforcement of property rights, particularly in the field of intellectual property, may require, however,

international norms and institutions. This is one of the issues addressed during the Uruguay Round of GATT negotiations.

2. See supra, Part II, §2.2.
3. Id.
4. See supra, Part I, §1.3.2.
5. See supra, Part I, §1.3.2 (2) & (3).
6. See supra, Part I, §1.2.2.
7. See supra, Part I, §1.2.2.2.
8. See in particular supra, Part I, §1.2.1.3.
9. Within federal systems, such as the United States or the European Community, this need translates in a increased capacity for "federal" institutions to create central norms ; see supra, Part II, §2.1.
10. W. Friedman notes that :

"La conception fonctionnelle permet d'imaginer, au fur et à mesure que les Etats tenteront de répondre aux défis que représente tel ou tel problème précis, qu'un réseau de plus en plus étendu d'organisations internationales viendra progressivement combler les lacunes de l'ordre juridique international et que, progressivement, l'interdépendance véritable des diverses organisations et de leurs objectifs les amèneront à établir entre elles des liens." In De l'efficacité des Institutions internationales, Collection U., série "Relations et institutions internationales", Paris (1970), at 105-106.
11. See supra, Part I, note 94.
12. However, integrated policies must share a common view of what is the proper role of government in society, a point which we have stressed at the outset ; see supra, Part I, note 127 and accompanying text.
13. See supra, Part I, §1.3.
14. See supra, Part II, §2.2.1.2(2).
15. For an example of a Voluntary Export Restraint, see supra, Part I, note 379.
16. See supra, Part I, §1.2.2 for tariff protection.

17. See infra, in Part I, Introduction, §0.(2). See Kahn, "Droit international économique - Droit du développement - Lex mercatoria - Concept unique ou pluralisme des ordres juridiques ?" in Le droit des relations économiques internationales - Etudes offertes à B. Goldman, 97, Paris, Librairies Techniques (1982), at 99. For some, the words international, transnational and global are to be taken as synonyms ; id. For others, their progression evidences a reduction in the significance of states' frontiers for the participants in the international economy ; id. M. Beau proposes the following definitions, which make a lot of sense, but are not universally used :

"National, se rapporte principalement à l'Etat-nation et à la formation sociale nationale qui se constitue en son cadre.

International, s'applique aux relations repérables entre deux Etats-nationaux.

Multinational ou transnational, s'applique aux espaces que les firmes, banques, organismes financiers constituent sur la base de (et à travers) plusieurs Etats-nations.

International, se décompose dès lors en deux :

1) au sens strict, relations entre deux agents distincts situés dans deux Etats-nations;

2) l'autre composante, correspondant à des relations (entre Etats-nations) internes à l'espace multinational d'une firme ou banque.

Plurinational, s'applique à l'action conjointe de plusieurs Etats-nations (exemple : coopération, concertation, planification plurinationales).

Mondial, s'applique à ce qui concerne le monde entier, ou l'ensemble, la plus grande partie du monde, en débordant à la fois l'espace des Etats-nations et celui des firmes multinationales..." In M. Beaud, Le système national mondial hiérarchisé, Paris, AGALMA, La découverte (1987), at 5.

18. See supra, Part I, note 4.

19. See supra, Part I, note 6.

20. See generally Demaret, L'extraterritorialité des lois et les relations transatlantiques - Une question de droit ou de diplomatie? 21 R.T.D.E. 1 (1985).

21. See supra, Part I, Introduction, §0.(3).

22. But also individuals, such as rock-stars, sportsmen,... who, however, make the market for state play only with regards to limited issues such as personal income taxation for very wealthy individuals ; while companies make the game play for all aspects of economic regulation or taxation.

23. See, for example, The Economist's, May 6, 1991, at 11.
24. Beaud, supra, note 17, at 102.
25. This is the lesson French Socialists' learned the hard way in 1981-1983 ; see supra in Part I, note 37 and accompanying text.
26. Id.
27. Susan Strange remarks that :

"... the nature of the competitive game between states is not what it was. Instead of competing for territory (because land was the prime source of wealth and therefore wealth and political power for the state could be achieved through control over the territory), states are now increasingly engaged in a different kind of game : they are competing for world market shares as the surest means to greater wealth and therefore greater economic security" ; in The Persistent Myth of Lost Hegemony, 41 Int'l Org. 551 (1987), at 564.
28. See supra, Introduction, §3.
29. See supra, Part I, §1.1.3.
30. See supra, note 27.
31. See Strange, The Study of Transnational Relations, 52 Int'l Aff. 333 (1976), at 334-335. The struggle among states continues even after they have eventually created federal structures above themselves, such as in the European Community, but also in the United States ; see Pescatore, Private and Public Aspects of European Competition Law, 10 Fordham Int'l L. J. 373 (1987). In the commonwealth of peoples and states that the European Community is, in addition to private companies, the Member States themselves remain extremely powerful competitors. An accurate description of the rules on competition in EEC law must therefore include consideration of both the rules applicable to private operators ("undertakings") and the rules applicable to public operators. The theses of Pescatore is that even though the rules regulating the activities of the Member States are not organized systematically, they are based on the same principles as the rules applicable to undertakings. It is therefore possible to discern a coherent system of competition control applicable to private operators and members states alike. Id. at 373.

32. But it is different in developing countries where war may appear as still making sense as a mode of appropriation of economic resources, and still occurs.

33. See supra, note 27.

34. For Dupuy,

"Le territoire est la notion primordiale du droit des gens, il est l'assise spatiale des compétences de l'Etat, la zone irréductible, le siège de l'indépendance : on ne défend celle-ci que par celui-là. L'autorité du territoire n'a pas cessé de se développer dans le monde présent." in R.-J. Dupuy, La communauté internationale entre le mythe et l'histoire, Paris, Economica/UNESCO (1986), at 43.

35. This is so because many micro-economic actors, who control at least 3 factors of production (capital, knowledge and organization) out of 4 (the fourth being raw materials), are increasingly global and able to move to wherever they find the best returns. This mobility of factors of production also challenges classical notions of international economics ; see, for example, DeAnne Julius, Global companies and public policy : the growing challenge of foreign direct investment, Royal Institute of International Affairs, Pinter publishers, 1991, at 7-8. For Beaud,

"... on traîne depuis un siècle et demi une définition contestable - à la fois simpliste et biaisée - de la nation : un espace clos de facteurs - les facteurs de production étant absolument ou relativement immobiles dans le cadre des frontières, alors que les marchandises, elles, les traversent ; sur cette base a été élaborée une construction de plus en plus sophistiquée sur l'échange international, la spécialisation et la division internationale du travail ; chacun s'accorde sur le caractère extrêmement rudimentaire et inadéquat d'une telle définition de la nation, mais, pourrait-on dire, elle "fonctionne" et chacun s'en accomode." in Beaud, supra, note 17, at 33.

36. Companies, in particular, are so important in the global economy that they tend to get a sort of recognition in international economic law. If, in classical international law, states are the only subjects considered, it is not so in more recent developments which can be encompassed in the development of the "relational model" of international law. Dupuy, for example, distinguishes two separate models which co-exist in international law :

"Le modèle relationnel part de la situation qui s'est développée tout au long des siècles ... Composé d'Etats souverains, c'est un système qui refuse toute transcendance. (...) ... à partir du XVI^e siècle, l'enrichissement qui résulte des grandes découvertes pour certains pays va y susciter l'Etat moderne (...) ... entre Etats se nouent des rapports horizontaux : les relations du pouvoir et du droit s'établissant latéralement.

L'autre modèle, celui du système institutionnel, part du phénomène qui tend à regrouper les Etats et à ériger parmi eux et au-dessus d'eux des normes juridiques et des organes chargés d'en faciliter, d'en contrôler, voire d'en assumer eux-même l'effectivité. (...) ce qui est essentiel à saisir, c'est que l'ordre institutionnel ne s'est pas substitué à l'ordre relationnel. (...) ... les deux modèles que nous avons retenus sont synchrones : l'institutionnel, et c'est là qu'est la tension dialectique, coexiste avec le relationnel." supra, note 34, at 41-42.

In the "relational model" of international law, Dupuy notes "D'une part, le quasi-monopole par les Etats de la qualité d'agent juridique, de l'autre, l'exclusion des individus du droit international public" ; id. at 43. With the development of what Dupuy calls the institutional model in international law, which is necessary to explain the surge in international economic organizations, other institutions than states are becoming subjects of rights and obligations in international law. It is true in particular in the European Community, where the "institutional" aspects are in fact so important that this field of international law may have become of a "constitutional" nature.

An interesting parallel can be made here between developments in economic and in legal doctrines : while micro-economic organizations increasingly tend to become subjects of international economic law, which gives them access to some forms of international justice, some economists attempt to understand the nation not as a closed space of production factors (see supra, note 35), but as a "groupe de groupes orientés et arbitrés par un Etat qui use de la contrainte légitimée et organisée" ; or as a "groupe de groupes orientés, coordonnés et arbitrés par l'Etat qui exerce le monopole de la contrainte publique" (see Beaud, supra, note 17, at 37, citing Perroux). This book can in some sense be understood as an attempt to merge these two developments : today's world-economy, studied in an institutional perspective, is comprised of international organizations (groups of states), of states (which are groups of groups) and of companies (other types of groups, not necessarily comprised within the territory of one single state) in which the distribution and control of power requests new procedures to allow for a smooth functioning of competition.

37. See supra, Part I, §1.1.2.
38. E. Gaillard has developped a fascinating theory of power in French private law : Le pouvoir en droit privé, Paris, Masson (1985). A summa divisio in law may be between the exercize of property rights and the exercise of power, the first being a prerogative of the individual, the second a consequence of the structuring of individuals' actions in organizations ; and while the first should be made independently and freely (because it is considered has having consequences only for the individual making the decision), the second should be subject to some form of control (because it has consequences for the one making the decision as well as for others). The summa divisio in a liberal legal system is then NOT between "public" and "private", and in each instance where there is exercise of power in any organization, there should exist procedures to control such use. Gaillard's analysis shows that even in private law, "Si l'on devait définir d'un mot la prérogative qu'emporte tout pouvoir, c'est le terme de décision qui viendrait aussitôt à l'esprit. Le titulaire du pouvoir est en effet investi du droit de faire prévaloir sa décision, de trancher, par l'exercice de sa volonté, une situation juridique et d'imposer à autrui la décision prise : le titulaire du pouvoir est bien le "décideur" que décrivent les économistes." at 138 (emphasis added). What this book does is actually attempt to offer a demonstration of the need and possibility to extend procedures of control of creators of norms (constitutional review) to prevent the adoption of protectionism. The goal is to develop procedures of constitutional review which are necessary to set the foundations of a sound international economic regime. We will see below that the procedures needed to make such control effective require a recognition of the role of "private" economic actors in the functioning of the legal system of allocation of power ; if proper procedures are open to private economic actors, their use, made in the pursuit of the sole interest of the firm using them, may entail large social benefits ; see infra §3.1.2.2.
39. See supra, Part II, notes 119 to 125 and accompanying text.
40. On the taxonomy of issues presented by integrated multi-state economies, and on the mechanisms to use to address them, see Part II, §2.0.1 & §2.0.2. On point (ii), see, for a general description of the circumvention of public institutions by sectional interests in the field of trade regulation in the United states context, Part I §1.3.2.
41. See generally supra Part I, Introduction and §1.1.

42. See supra, Part I, note 10.
43. See, for example, The Economist's, June 23, 1990, at 69, on the role of foreign direct investments in forcing governments to compete. With regard to the beneficial aspects of state competition in the field of regulation, Collins notes in the context of the United States federal system :

"Efficiency of local lawmaking is a basic justification for state autonomy in the federal system. Local lawmaking can be more exactly tailored to particular problems and can more readily experiment with different solutions. Competition among legal systems generates efficiencies as jurisdictions compete to attract and retain people and capital."

However, Collins also notes that this works only if economic resources are mobile (i.e. economic frontiers are eliminated) and if there is no cost-exporting legislation (of which protectionist legislation is but one kind) :

"Local lawmaking best serves these ends when people and resources are mobile and when local laws do not export significant costs. When government cost borne at home become relatively large, a state's products are less competitive than products of states imposing lower costs. Local politics then restrain the legislature. When the same costs are largely exported, political restraint weakens or disappears." See Collins, Economic Union as a Constitutional Value, 63 N.Y.U.L.Rev. 43 (1988), at 68

44. See supra, Part I, § 1.1.1 (2)(i).
45. On the concept of the international society as an anarchy, see supra, Part I, note 3. In a recent note on the Developments in the Law - International Environmental Law, 104 Harv. L. Rev. 1484 (1991) [hereinafter the "Note"], the connection between anarchy and sovereignty was straightforwardly made : "The international system is most appropriately characterized by anarchy ; states are sovereign." See at 1553.
46. One has to realize, however, that even though there is no legal principle of international law legally constraining any state to have a particular internal mode of organization of its economy, the existence of a globalizing liberal economic system creates unavoidable constraints.
47. See supra, Part I, §1.1.2 & 1.1.3.

48. See supra, Part I, §1.1.2.
49. Id.
50. See supra, §3.1.2(1) & §3.1.2(3)(i).
51. See supra, Part I, Introduction 1.(2).
52. See supra, Part I, §1.1.2.
53. Even when they decide to create organizations among themselves, for example if they think it is an efficient way of allocating their economic resources, which internally will then function according to the rules set by the hierarchy managing the organization, and not according to market mechanism (which is the "nature of the firm" ; see Coase, The Nature of the Firm, 1937 *Economica* N.S. 386), It is always, at the end, market competition which disciplines the functioning of organizations. Such organizations may become big and inefficient but, at least theoretically, and practically more often than not, market selection eliminates the inefficient organizations. As for the individuals subject to the authority of those in control of the organization, they are, as employees, protected by labor law, and by their right to leave the organization. In this manner, the liberal system allows society (as opposed to the government) to determine the changing equilibrium between market competition and organization, individuals' rights and their alienation in structures of command (firms), etc... It is the role of antitrust law is to preserve the very existence of competition in national economies from private actions by holders of power which would destroy competition, which would have as a consequence to damage the whole foundations of the liberal regulatory system and of market society in general.
54. This explains why, with economic development, there has been, everywhere, a tremendous increase in state regulation, a modification of the social role of the state from that of the night watchman to that of a positive actor in the economy.
55. See A. Cassese, International Law in a Divided World, Clarendon Press, Oxford (1986), at 13.
56. See supra, Part I, §1.2.2. & §1.3.
57. There are several means of protecting the proper functioning of a liberal society. One of them is to decentralize power ; another one is judicial review of norms. We can follow Cappelletti, who remarks :

"... constitutional justice [implies] the adoption of a new kind of constitutional norms, institutions, and processes in an attempt to thereby limit and control the political power. There are, of course, a variety of ways to achieve that end. These include regionalism, which brings about a decentralization of at least part of the political power, one form of a "vertical sharing" of that power. [They also include] judicial review of the constitutionality of state action, and particularly of legislation." in Cappelletti, "Repudiating Montesquieu ? The Expansion and Legitimacy of "Constitutional Justice"", in Noi si mura, Selected Working Papers of the European University Institute, European University Institute, Badia Fiesolana, Florence (1986), 191, at 193-194.

58. Cappelletti remarks :

"Austria since 1945, Japan since 1947, Italy since 1948, Germany since 1949 ; emerging from the nightmare of tyranny and war, all these countries have followed a similar path in their effort to build a new form of government, civil-libertarian and democratic. (...) ... even in the United States the role of constitutional adjudication has acquired its current importance only in the post-World War II epoch, when it became the foremost instrument for the enforcement of certain basic civil rights of individuals and minority groups against reluctant majorities in the states, and against the inaction of the political branches at the federal level." Id. at 194.

The European Court of Justice's role in reviewing the "constitutional" validity of Community and state norms within the fields covered by the Rome Treaty and the other documents founding the European Community has been instrumental for the definition of the allocation of regulatory power among states and the community's institutions, and to set limits to such powers. On France, see infra, note 60.

59. On this issue, Cappelletti notes :

"Constitutions and bills of rights, of course, have existed in France, Germany and elsewhere for many years. Until the post-World War II epoch, however, their meaning tended to be that of political-philosophical declarations rather than that of legally binding enactments. For, with few sporadic and short-lived exceptions (most notably that of Austria in the 1920's and early 1930's), no independent body was entitled to supervise their actual application. The constitutional revolution - and I do mean what this word says - occurred in Europe

only with the suffered acquisition of the awareness that a constitution, and a constitutional bill of rights, need judicial machinery to be made effective. The United States certainly provided an influential precedent. But the most compelling lesson came from domestic experience, the existence of tyranny and oppression by a political power unchecked by machinery both accessible to the victims of governmental abuse, and capable of restraining such abuse." Id. at 194-195.

60. France has been, and still is, reluctant to participate in the "constitutional revolution" ; (on this revolution, see supra, note 58). Parliamentary democracy having been its political credo since the 1789 Revolution, the Parliament is considered as being immune from judicial control ; see id. at 196. However, the Constitution of 1958 has created a Conseil Constitutionnel, which has asserted itself for the first time as an independent, quasi-judicial organ whose role is to review the constitutionality of Parliamentary legislation violative of fundamental rights. However, such legislation can be attacked only by a minority of at least 60 members of either Chamber of Parliament, or by the President of either Chamber of Parliament, or by the President of the Republic pending promulgation of a loi ; individuals have no possibility to bring their complaints before the Conseil Constitutionnel ; see id. at 200. President Mitterrand proposed to amend the Constitution so that individuals' standing would be recognized, which would allow them to invoke violations of their fundamental rights in front of ordinary courts during an interview on French TV on July 14, 1989, exactly 200 years after the Revolution, which is at the origin of the very particular French understanding of the meaning of the doctrine of separation of power. But the proposal hasn't arose a great deal of enthusiasm, and no change has been made in the French constitution since. Review of the constitutionality of the actions of the Executive is made by the Conseil d'Etat ; see id. at 199.
61. See generally supra, Part II, §2.2 on the role played by case law (and therefore by litigants) in determining in both the United States and the European Community what is appropriate and inappropriate (because protectionist) state action.
62. On the extension of the control of abuse of power to holders of power in firms, see generally Gaillard, supra, note 38. The increasing control of the use of power in so-called "private" firms amounts to an extension of constitutional justice in now non-democratic micro structures of exercise of power, which construction is possible by a concentration of property rights, which allows the construction of large formal and normative organizations.

63. Miller, Toward the "Techno-Corporate" State? - An Essay in American Constitutionalism, 14 Vill. L. Rev. 1 (1968) at 18-19.
64. Id.
65. Miller, The Modern Corporate State : Private Governments and the American Constitution, Greenwood Press, Conn. (1976) at 30.
66. Miller, supra, note 63, at 19. The organization of social activity in groups has for consequence that sovereignty is splintered. It is shared by public government and the private governments of enterprises. This is so because if power can be defined as the capacity to make decisions that influence others, then enterprises certainly have a great deal of power in our industrial societies. Speaking of sovereignty being to speak of power, enterprises in fact share sovereignty with public governments, Bodin and Austin to the contrary. See e.g. Miller, supra, note 65, at 29.
67. M. Lerner, America as a Civilization, 289 (1957), as cited by Miller, supra, note 65, at 20.
68. See supra, Part II, §2.1.1 & §2.2.1 ; see generally, McCloskey, The American Supreme Court, Chicago, The U. of Chicago Press (1960).
69. P.J. Slot, Technical and Administrative Obstacles to Trade in the EEC, Leyden, A.-W. Sijthoff (1975), at 126.
70. Id.
71. See Smith, P., The Shaping of America, vol. 3, New York, McGraw-Hill (1980), at 50.
72. Id.
73. See id. at 231.
74. See supra, Part I, §1.2.2.2.
75. Article I, Section 10 of the U.S. Constitution prohibits the imposition of duties by states. See supra, Part II, §2.1.1(1)(ii).
76. Slot, supra, note 69, at 132.
77. Id. at 133.
78. Id. at 132.

79. Id. at 131.
80. See supra, Part II, §2.1.1.
81. Slot, supra, note 69, at 141.
82. See supra, Part I, §2.1.1.
83. Id.
84. See, for example, T.L. Lowi, The End of Liberalism - The Second Republic of the United States, WW Norton & Co., (2nd ed., 1969 - 1979 ed.), particularly in Part I, §2.
85. See Gottlieb, Relationism : Legal Theory for a Relational Society, 50 U. Chi. L. Rev. 567 (1983), at 594.
86. Id. at 9.
87. Id. at 18-19.
88. With the limited signification we give to this notion of unified or single market ; see supra, Part I, Introduction, 2.
89. E.g. Lerner, The Supreme Court and American Capitalism, 42 Yale L. J. 658 (1933), at 671.
90. See Miller, supra, note --, at 3 ; See F. Frankfurter, The Commerce Clause - Under Marshall, Taney and Waite, The U. Of North Carolina Press, Chapel Hill (1937) at 63.
91. See Kommers & Waelbroeck, "Legal Integration and the Free Movement of Goods : the American and European Experience", in Integration through Law : Europe and the American Federal Experience, Vol. 1, Bk. 3, 165, de Gruyter, Berlin (M. Cappelletti, M. Secombe & J. Weiler eds. 1986), at 168.
92. L.M. Friedman, A History of American Law, New York, Simon & Schuster (1973), at 456.
93. Id. at 455.
94. See supra, Part I, §2.2.1.1.
95. See Brewster, "The Corporation and Economic Federalism", in The Corporation in Modern Society 72, Cambridge, Harvard U. Press (Mason ed. 1959), at 76.
96. Collins, supra, note 43, at 46. Collins remarks that :

"The Framers' concern with economic union arose from conflicts among the states and problems of foreign trade, not from disputes between the states and

individual merchants. Many enumerated federal powers were intended to ameliorate interstate conflicts. (...) ... the Court's doctrine is ... based on resolving commercial conflicts between the states. (...) The doctrine's use of the concept of discrimination does not mean personal discrimination against outsiders ; it is an instrumental device to identify protectionist actions by state governments that are hostile to other states. Although merchants often sue to enforce the doctrine, they do so as surrogates for their own state, acting in effect as private attorneys general." Id.

97. See supra, Part II, §2.1.2.
98. G. Mally, The European Community in Perspective - The New Europe, the United States and the World, Lexington Books, Lexington, Mass. (1973), at 3.
99. According to Weiler, normative supranationalism is concerned with the relationship and hierarchy which exists between Community policies and legal measures on the one hand and competing policies and legal measures of the Member States on the other. Decisional supranationalism relates to the institutional framework and decision-making process by which Community policies are initiated, debated and formulated, then promulgated, and finally executed ; Cf. Weiler, The Community system : the Dual Character of Supranationalism 1. Y. B. Eur. L. 267 (1981), at 271.
100. See Louis, L'ordre juridique communautaire, Office des Publications Officielles des Communautés Européennes, (5^e ed., 1990), at 44.
101. Id.
102. Id.
103. Id.
104. See supra, in Part II, § 2.1.1(2).
105. Weiler, supra, note 99, at 271.
106. See Sandholtz & Zysman, 1992 : Recasting the European Bargain, Draft (1989), at 27.
107. Id.
108. Id.
109. Id.

- 110. Id. at 28.
- 111. See supra, Part I, §2.1.2.
- 112. Id.
- 113. See Sandholtz & Zysman, supra, note 106, at 18.
- 114. Id.
- 115. Id. at 29.
- 116. Wisse Dekker of Philips and Jacques Solvay of Belgium's Solvay's chemical company, in particular, were vigorously arguing for the unification of the European Community's fragmented market ; e.g. id.
- 117. As cited by Sandholtz & Zysman, id.
- 118. Id. at 30.
- 119. Id. at 29-30.
- 120. Id. at 30.
- 121. Id. at 30-31
- 122. Id. at 31. See infra note 129.
- 123. Id. at 3.
- 124. Recherche sur le coût de la non-Europe, Office des publications officielles des communautés européennes (1988).
- 125. Sandholtz & Zysman, supra, note 106, at 29.
- 126. See generally Bourdieu, Décrire et prescrire - Note sur les conditions de possibilité et les limites de l'efficacité politique, 38 Actes de la recherche en sciences sociales, 69 (1981) :

"L'action proprement politique est possible parce que les agents, qui font partie du monde social, ont une connaissance (plus ou moins adéquate) de ce monde. Cette action vise à produire et à imposer des représentations (...) du monde social qui soient capables d'agir sur ce monde en agissant sur la représentation que s'en font les agents (...) Mais la rupture hérétique avec l'ordre établi (...) suppose la rencontre entre le discours critique et une crise objective, capable de rompre la concordance immédiate entre les structures incorporées et les structures objectives." id. at 69.

127. I owe in part the structure of my argument here to a seminar given by M. Emerson, who is Director General of Economic and Financial Affairs (DG II) of the European Commission, held at the European University Institute of Florence, in April 1989.
128. But a recent report of the Commission warned that "worrying delays" in the implementation by several Member States were threatening the creation of the Single Market ; see Int'l Herald Tribune, September 7, 1989, at 1.

More recently, The Economist's indicated that if the Council of Ministers and the European Parliament have approved 198 of the Community's programme of 282 measures to remove internal barriers by the end of 1992, of the 126 single market laws that should by now have been implemented, only 37 have been passed by all Member States. The best performers are Denmark, which has implemented 107, France with 103, Britain with 99 and Portugal with 96. Among the laggards, Italy has implemented only 52 laws, Ireland 74, Luxembourg 81 and Spain 83. Interestingly, The Economist's recalls that "A company that wants to get EC rules enforced does not have to rely on the Commission's help. Recourse to national courts costs money, but can be quicker. National judges are slowly becoming more familiar with EC case histories, but many of them remain reluctant to interpret European law." It indicates however that "The Commission is eager for national courts to take a greater role." See the issue of June 22, 1991, at 84.

129. See supra, Part I, Introduction, §I.(2)(iii), on national economies as networks of micro-economic transactions. The increasing density of the networks of micro-economic exchange relationships at the European level means that there is creation of a European Economy in a sensible sense.
130. On the mechanisms used to address the issues raised by the federal structure of governments, see supra, Part II, §2.0.2. On the way in which issues are solved in America and in Europe, see generally Part II.
131. See supra, §3.1.2(3)(i).
132. See supra, §3.1.1(1)(ii).
133. See supra, §3.1.2(4).
134. See supra, §3.1.2(3)(ii).
135. See, for example, Collins, supra, note 43.

136. See supra, §3.1.3.2.
137. See supra, §3.1.3.2(3).
138. See supra, Part II, §2.0.1.
139. The Economist's, December 22, 1990, at 76.
140. Weiler refers to the Community as a multisectorial condominium whereby, unlike the territorial condominium (USA type) in which there is joint control over territory, here there is joint control over economic and other sectors of policy ; Weiler, supra, note 99, at 279.
141. See Conybeare, International Organization and the Theory of Property Rights, 34 Int'l Org. 307 (1981), at 307.
142. In the field of environment protection, the Note suggests that

"International regimes derive their legitimacy less from their ability to implement general legal rules than from their capacity to reshape the context within which states conceive their self-interest. (...) The divergent nature of states' interests in international environmental control suggests that such an enterprise may require that environmental issues be linked to economic or political issues. By batching issues, such as development assistance, debt relief, and economic aid along with environmental management, a broader international regime would foster bargaining and, ultimately, cooperation among states by allowing for more potential guids for each quo." See Note, supra, note 45, at 1521.
143. See supra, Part II, §2.0.1.
144. Id.
145. See, in the environmental context, the Note, supra, note 45, at 1534.
146. Id.
147. Id.
148. Id.
149. Id.
150. Id.

151. V. Curzon, The Essentials of Economic Integration - Lessons of EFTA Experience, London, Macmillan (1974), at 95. In the European Community context, Moussis describe the function of the Community's regional policy :
- "... les efforts demandés aux pays membres les plus faibles pour atteindre les buts toujours plus haut fixés en commun doivent être compensé par l'effort financier des pays les plus riches pour atténuer les disparités régionales. Ce principe communautaire qui est dans l'intérêt des partenaires tant pauvres que riches puisque le développement économique des uns agrandit le marché des autres, a été bien suivi jusqu'à présent." in Une approche intégrée de l'intégration européenne, 348 *Revue du marché commun et de l'union européenne*, 433 (1991) at 435.
152. Rubin, "A predominantly Commercial Perspective", in Environment and Trade 3, Allanheld, Osmun Pub. (Rubin & Graham eds. 1982), at 14.
153. See generally Seidl-Hohenveldern, "The Third World and the Protection of the Environment", in 3 Estudios de Derecho Internacional - Homenaje al Professor Miaja de la Muela 351, Madrid, Editorial Tecnos (1979).
154. Curzon, supra, note 151, at 95 ; A. Kiss, Le droit international de l'environnement, Paris, Pédone (1989), at 36-38.
155. See id. at 96.
156. Id.
157. Id.
158. Id.
159. On the distinction between sovereignty for internal purposes and sovereignty for external purposes, see supra, §3.1.2. See Beaud, supra, note 17, at 102.
160. The Economist's goes as far as saying that foreign direct investments have made of economic sovereignty a myth. See issue of June 23, 1990, at 69,
161. In the context of the European integration, R. Schuman wrote :
- "La loi démocratique de la majorité, librement acceptée dans des conditions et des modalités préalablement fixées, limitée aux problèmes essentiels de l'intérêt commun, sera en définitive moins humiliante à subir que les décisions imposées par le plus fort." in R. Schuman, Pour l'Europe, Genève, NAGEL (1990, 1st ed. 1963), at 25.

- 162. J. Tumlr, Protectionism - Trade Policy in Democratic Societies, Wash., D.C., American Enterprise Institute (1985), at 66.
- 163. Id. at 68.
- 164. Id.
- 165. See Id.
- 166. Id.
- 167. Id.
- 168. Id.
- 169. See supra, Introduction, 4.
- 170. See supra, Part II, §2.0.2.
- 171. See supra, Part II, §2.0.1.
- 172. See supra, Part II, §1.2.2.
- 144. As remarked by the Note, supra, note 31, "the United States' ratification process may not only delay the entry into force of an agreement, but also jeopardize its very existence" ; at 1526. The ITO never came into existence precisely because the United States' Congress never ratified the Havana Charter ; see supra, Part I, §1.2.2.2. Currently, the problem is eased with regard to GATT negotiations by using a fast-track approach pursuant to which Congress is deprived of its ability to amend the international agreement reached ; see generally J.H. Jackson & W.J. Davey, Legal Problems of International Economic Relations, St. Paul, Minn. West Pub. (2nd ed. 1986), at 151-155.
- 174. J.H. Jackson, World Trade and the Law of GATT, New York, Bobbs-Merrill Co. (1969), at 241.
- 175. Id.
- 176. Id.
- 177. Id. ; in fact, as a matter of example, four principal criteria were used by the United States negotiating team during the Kennedy Round : the average depths of tariff cuts, the trade volume offered for concession ; the loss of duties collectable and the projected trade impact. But the fourth criterion was the main criterion of reciprocity ; see Roessler, The Rationale for Trade Reciprocity in Trade Negotiations under Floating Currencies, 31 KYKLOS 258 (1978), at 268.

178. Jackson, supra, note 174, at 241 ; furthermore, supply and demand elasticities are never fully known ; Roessler, supra, note 177, at 268.
179. See supra, Part I, §1.3.
180. See supra, Introduction, §3.
181. See for example The Wall Street Journal Europe, which writes :
- "We were sorry to see it happen, but the collapse of the trade talks does finally clear the air on free trade. Perhaps we can even start to understand that the best policy for a nation is to pursue free trade not multilaterally or bilaterally, but unilaterally." issue of December 13, 1990.
182. This is true for international law in its generality. For example, Cassese writes that "in actual practice, States tend to comply with international law out of sheer self-interest ; this holds true for bilateral treaties as well as for multilateral treaties or customary rules based on reciprocity (...) Instead, many States are markedly reluctant to implement (1) multilateral treaties not based on reciprocity (...) and (2) customary rules imposing duties which in actual fact operate "unilaterally" or "asymmetrically"..." ; in A. Cassese, International Law in a Divided World, Clarendon Press, Oxford (1986) at 17.
183. One of the reasons why the système des traités disappeared quickly at the end of the nineteenth century (see supra, Part I, §1.2.2.1) is that England, which was at the origin of its creation, was actually itself pursuing a policy of unilateral free trade. This means that it could reverse its policy without breaching its international obligations. it is possible that even if England would have been bound to free trade by treaty, it would have preferred to breach its international obligations rather than to remain a free trader. But since breaching an international obligation usually implies a cost, it is clear that the perceived benefits of protectionism must be higher when free trade is provided by treaty than by a unilateral decision.
184. See supra, Part I, §1.2.1.1.
185. Jackson, supra, note 174, at 208.
186. See supra, Part II, §2.2.
187. See supra, Part I, note 176.

188. See generally, Jackson & Davey, supra, note 173, at 401.
189. Id. at 402.
190. Jackson, supra, note 174, at 223-224.
191. Jackson & Davey, supra, note 173 at 401.
192. Id. Canada, Australia, New Zealand, South Africa and all the developing countries were exempted from the requirement of the initial fifty percent linear offer. Developing countries argued that under Part IV of GATT added in 1964 they were not required to offer reciprocity and should not be required to make the linear offer. The developed countries which were exempted received exemption because they depended heavily upon agriculture and raw material exports, and since these products were generally exempted from the linear offer, these countries could not hope for equivalence under reciprocity if they were required to make a fifty percent linear cut offer on industrial product imports.
193. During the Tokyo Round, a so-called "Swiss formula" was used to address the "disparities issue" (by which is meant the fact that some countries had tariff with "picks and valleys" (the United States) and that others had more uniform tariffs (the European Community) ; See Jackson & Davey, supra, note 173, at 409.
194. Jackson, supra, note 174, at 243.
195. Id.
196. Bergsten, for example, has proposed, together with three other "sweeping new reforms" to be pushed by the Big Three [the United States, the European Community and Japan] by 2000 the "elimination of all tariffs on all industrial trade" ; Bergsten, The World Economy after the Cold War, Foreign Aff. 96 (1990), at 110. See also A. Oxley, The Challenge of Free Trade, Harvester Wheatsheaf, (1990), at 206-207.
197. Jackson, supra, note 174, at 245.
198. Id. at 246. On the hold-out problem with regards to the creation of international regimes in general, see supra, §3.1.4.1(3).
199. Id. An exception could be granted to developing countries, who should benefit from the free trade area without compensation.
200. See Curzon, supra, note 151 and accompanying text.

201. See supra, Part I, §1.2.1.2.
202. Emphasis added.
203. During the Kennedy Round.
204. See Jackson & Davey, supra, note 173, at 325-326.
205. Id. at 326.
206. GATT, Basic Instruments and selected Documents, twenty-Sixth Supplement, 1978-79, Geneva, March 1980 at 8 [Hereinafter the "Code", or "Standards code"].
207. Id. in Preamble, at 8.
208. Id. emphasis added.
209. Id. emphasis added.
210. Id. emphasis added.
211. Id. Art. 2.1.
212. See supra, Part II, §2.2.
213. Id. Art. 14.2.
214. The Agreement was signed in August 1991.
215. See supra, §3.1.3.2.
216. The countries with national quotas were Great Britain, France, Italy, Spain and Portugal ; see The Wall Street Journal Europe, issue of August 1, 1991. In addition, cars imported in Europe bear a 10.5% import duty ; e.g. The Wall Street Journal Europe, issue of September 18, 1991.
217. See supra, Part I, §1.1.1.
218. In the 1950s, Italy was allowed to impose a quota on Japanese cars in retaliation with the import limits that Tokyo, worried about competition from Europe, had first put on Italian cars ; see The Financial Times, August 5, 1991. The Spanish and Portuguese Japanese car import quotas were also acquired before they joined the European Community. This is not so for France. See id.
219. The Financial Times has obtained a copy of the Agreement, and detailed it in its issue of August 5, 1991.
220. The 1.23 million vehicles per year corresponds roughly to the 1990 figure ; e.g. The Wall Street Journal Europe, issue of September 18, 1991.

221. In 1990, Japanese penetration was, in France 78,159 ; in Italy, 35,618 ; in Spain 19,918 ; e.g. id.
222. The Wall Street Journal, August 1, 1991. The haziness of the Agreement on the transplant issue has already led to public disputes : on September 11, 1991, Mr. Kume, the Chief Executive of Nissan Motor and president of the Japan Automobile Manufacturers' Association declared that the 1.2 million figure was "not a figure we have agreed between Japan and the EC. (...) There is talk in some quarters of a limit of 1.2m, but that is not the kind of thing that will bind the Japanese side." see The Financial Times, issue of September 12, 1991. Meanwhile, Mr. Calvet (the chairman of Peugeot) vowed to continue a campaign to have EC negotiations with Japan reopened and declared "we must restart the whole thing." see id. On September 15, 1991, European Commissioner Andriessen declared that the Agreement places no formal limit on transplants ; see The Financial Times, issue of September 16, 1991.
223. Id.
224. The Financial Times, August 5, 1991.
225. See The Wall Street Journal, August 2-3, 1991.
226. The Economist's, May 4, 1991, at 19.
227. Id. at 20.
228. However, in order to get an idea of the amount of the bill, compare with the cost of the Japanese-US auto restraint agreement ; see supra, Part I, note 379.
229. See The Wall Street Journal, August 2-3, 1991.
230. Id.
231. According to the Wall Street Journal Europe, "overmanning is the most serious of Europe's auto ailment. Social legislation is partly to blame. (...) But Nissan's British plant has successfully implemented lean and efficient production techniques, working under the same laws as Britain's industrial heavies. Some well protected European producers simply haven't made much of an effort to imitate successful Japanese manufacturing techniques." in issue of September 18, 1991.
232. As has been written in the context of the Japanese-American auto restraint agreement (see supra, Part I, note 379), "The crucial difference between an appropriately structured and administered escape clause,

and "voluntary agreements" unconnected with an escape clause case, lies precisely in this necessity for making a reasoned, public case of serious injury caused by imports in the one, and the lack of any such necessity in the other. Assertion can often take the place of reasoned proof when a public, contested case is not involved ; it is rare that such a displacement will occur when confrontation and a record are present." in Metzger, Injury and Market Disruption from Imports, U.S. Commission on International Trade and Investment Policy, Papers I, 167 (1971), at 173.

233. On the existing escape clause, see Jackson & Davey, supra, note 173, at 538-647.
234. This was one of the conclusion of an OECD Report, which proposed "to make the safeguard clause more effective ... to specify the obligations of the applicant country more precisely, as follows :
- (a) In the first place, the temporary nature of the protection measures should be emphasized by setting a relatively short time limit on their application.
 - (b) Second, the applicant country should undertake in any case not to reduce its imports below their level at the time the restrictive measures are applied and to allow imports to increase at a reasonable rate.
 - (c) Finally - and this is a fundamental point - application of the safeguard measures should be accompanied by action to bring about domestic adjustment so that the use of the safeguard mechanism will in fact be temporary." in OECD, Policy Perspectives for International Trade and Economic Relations (1972), at 84.
235. See supra, §3.1.4.1(3)(iii).
236. See generally G.C. Hufbauer & J.J. Schott, Trading for Growth, Wash., D.C., Institute for International Economics (1985), at 23-25. One of four "sweeping new reforms" which, according to Bergsten (see supra, note 165a) should be pushed by the Big Three by 2000 is "a complete ban on all quantitative trade barriers including "voluntary export restraint agreements" ; id.
237. Id. at 25.
238. Id. Tariffs and auctioned quotas have the additional advantage that they allow a self-financing of the adjustment programmes ; id. ; see Stern, Analysis of legislative proposals to Change Section 201, Finance Committee, Senate, Proposals to reform the Escape Clause, C.I.S. Index (1987) S361-10.1, 21. The possibility to convert all border barriers to farm imports into tariffs

and then to gradually reduce them has already been contemplated in the context of the reforms of the European Common Agricultural Policy ; see infra, §3.2.3(3).

239. Hufbauer & Schott, id. at 25. For example, if one takes, as a working assumption a 1 percent to 3 percent decrease in tariff or tariff-equivalent protection per year, in an industry like apparel - where the actual tariff-equivalent protection in the United States probably exceeds 39 percent - the phasing-out might take 15 years or more.
240. See supra, §1.3.3(2)(ii)(b), with regards to the problem in the United states; with regards to the problem in the European Community, see supra, Part I, note 332.
241. The distinction between fair trade practices and "unfair" trade practices is traditional in international trade rules ; see Jackson & Davey, supra, note 144, at 539. For a study on the way these two tracks are implemented in US domestic law, and on how their application leads to a blurring of the two, see supra, Part I, §1.3.3. This problem is not specific to the United States ; see id. If there is a case for free trade to be complemented by fair trade (see Bhagwati, Multilateralism at Risk - The GATT is Dead, long Live the GATT, 1990 World Econ. 149, at 152), the problem is that if everything becomes a question of fair trade, the likely outcome will be to remove the possibility of agreeing on a rule oriented regime ; id. at 155.
242. See generally supra, Part II, §2.2.
243. See supra, §3.1.2.2 & §3.1.3.
244. Destler & Odel were noticing in a recent study that "One reason why protection has not been greater is the political role played by private interests that benefit from international trade and pay a high price when it is curbed." in Anti-protectionism : Changing Forces in United States Trade Politics, Institute for International Economics, Wash. (1987) at 1.
245. Id. at 31.
246. Id.
247. Moussis describes the process through which the frustration of economic actors leads to economic integration in the following manner :

"Au départ nous nous trouvons dans une situation où les Etats ont dressé autour d'eux de hautes barrières

de protection vis-à-vis du commerce extérieur et donc de la concurrence internationale. (...) Abstraction faite des régimes totalitaires, ce système protectionniste ne peut durer très longtemps. Il conduit à une grande insatisfaction des consommateurs dont le choix est très limité, et des agents économiques les plus dynamiques et les moins protégés, qui trouvent leur champ d'activité limité par les barrières." in Moussis, supra, note 151, at 434.

- 248. Destler & Odel, supra, note 244, at 3 & 23.
- 249. Id. at 129.
- 250. Id.
- 251. For Destler & Odel, "transnational political influence is a natural, even desirable, consequence of economic interdependence. (...) But anti-protection politics, like trade liberalization, works best when it is reciprocal. Americans should be equally involved in the struggle for open markets abroad" ; id. at 135. Their conclusion thus seems to concur with our opinion that a constitutional change giving a voice to foreigners is an important element in a new free trade regime to keep it open.
- 252. Lacharrière, Case for a Tribunal to Assist in Settling Trade Disputes, 8 World Econ. 339 (1985), at 347-348.
- 253. See, for example, Van Bael, The GATT Dispute Settlement Procedure, 22 J. World Trade L. 67 (1988).
- 254. Lacharrière, supra, note 252, at 340.
- 255. R.E. Hudec, The GATT Legal System and World Trade Diplomacy, New York, Praeger Pub. (1975), at 31.
- 256. Lacharrière, supra, note 252, at 349.
- 257. J. Bhagwati, Protectionism, Cambridge, Mass. MIT Press (1988), at 115.
- 258. Tumlir, supra, note --, at 61.
- 259. Id. at 62.
- 260. See infra, Part I, §1.1.2.
- 261. This is considered to be "utopian" by Lacharrière who is certainly right given that he speaks of a direct applicability of GATT itself. It seems less utopian to advocate direct applicability of the non-discrimination principle of the Free Trade Club Agreement only. See Lacharrière, supra, note 252, at 347-349.

262. E.g. Selznick, Law - the Sociology of Law, 9 Int'l Encyclopedia Soc. Sci. 50 (1968) at 54.
263. See supra, Part I, §1.2.1.1.
264. The Legal status of GATT in US domestic law has never been made entirely clear ; but see generally Hudec, "The Legal Status of GATT in the Domestic Law of the United States", in The European Community and GATT 187, Kluver, Deventer, the Netherlands (M. Hilf, F.G. Jacobs & E.-U. Petersmann, eds. 1986). Two central propositions are generally accepted :
- (1) the General Agreement is a valid Executive Agreement (See id. at 199). Although courts have never found GATT superior to federal law, they have uniformly treated GATT as though it were a valid international obligation of the United States, properly entered in accordance with US domestic law ; id. at 211. Moreover, on several occasions they have indicated a willingness to interpret federal law in ways that facilitate United States compliance with GATT ; id.
- (2) The GATT prevails over state law, but is inferior to federal law ; See id. at 199. An international agreement, validly proclaimed as federal law, is superior to conflicting state law, even if it is not superior to other federal law. The federal government possesses adequate legal power to preempt state law in this manner. It does not matter whether the international agreement is authorized or approved by Congress, because even an Executive Agreement resting solely on the President's foreign affairs power prevails over conflicting state law ; id. at 219.

In the European Community, the Court of Justice has declined to recognize the provisions of GATT as having any direct effect and accordingly laid the rules of GATT to rest both within the Community itself and within all Member States ; see Pescatore, "Introduction" to The European Economic Community and the GATT, supra, at xvii. As GATT is not directly effective, individuals can not invoke it to contest the legality of national or community laws. This means that courts in the Member States cannot rely on it to declare unlawful measures taken by their governments, and the Court of Justice is likewise unable to hold Council or Commission decisions invalid on that basis ; see Ehlermann, "Application of GATT Rules in the European Community", in The European Community and the GATT 127, Kluver, Deventer, the Netherlands (M. Hilf, F.J. Jacobs & E.-U. Petersmann eds. 1986), at 137.

265. Hufbauer & Schott, supra, note 236, at 63.
266. See supra, Part I, §1.2.1.2.
267. The concept of "nullification or impairment..." occupies the same structural position in GATT as the concept of discrimination in US and EC law. But these two concepts do not screen the same policies at all, however. They both are the rationale along which measures having some negative effects abroad (and therefore felt as such by some economic actor, and challenged either directly by this actor (in the United States and in the European Community) or by his state enforcing its (or its industry's) complaint (in GATT)) are measured. The first concept is at the center of a procedure aiming at weighting interests : it is a political device allowing to determine when a new political weighting of the interests involved in a particular issue must be made by bargaining politicians. The other concept is used by courts to screen protectionist policies, and is not a balancing test. The role of a court is not to make political judgments ; and it is precisely because it is possible to screen protectionist policies by the use of technical criteria (see generally, Part II, §2.2) that it is possible to entrust courts with this mission (and those who say that protectionism should be restricted by the use of a balancing test are wrong for the very reason that a balancing test requires political weighting of interests). A fully fledged legal system (with courts) dealing with anti-protectionism must allow the use of technical criteria to determine where protectionism is located. While the fundamental problem of protection is discrimination which seems to require impossible investigations in peoples' minds, courts in the United States and in the European Community have found a way to screen intent using technical criteria. Fundamentally, if a norm has a discriminatory effect, but is adopted for the fulfillment of a "federally cognizable benefit" (in the United States) or for a "mandatory requirement recognized by Community law" (in the European Community), and this negative effect is necessary for the fulfillment of the aim sought, the norm must be accepted ; see id. GATT's procedural mechanisms can not go that far because the underlying regime is not an integrationist one. Political weighting is still necessary to maintain political bargains. And a court system within the existing system is unacceptable for states because its creation would amount to an entrustment of the power to make political decisions to a court.
268. Section 301 of the 1974 Trade Act is a procedure under which US firms and citizens can petition the US government to seek its aid to redress any foreign nation

action which is deemed to be violating "rights of the United States under any trade agreement" or to be denying "benefits to the United States under any trade agreement" or to be "unjustifiable, unreasonable, or discriminatory and burden or restrict United States commerce." See generally J.H. Jackson, Restructuring the GATT System, The Royal Institute of International Affairs, Pinter Publishers, London, 1990, at 69-73.

269. Regulation No. 2641/84 on "the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices" is designed to give individuals or firms in the European Community the right to petition the Commission to make an investigation of foreign government practices which are harming EC trade, and possibly to take action to counter such practices. See generally id., at 73-74.
270. Id. at 74.
271. As a further development to this trend, Professor Jackson considers it possible that
- "At some point in the future (it cannot happen soon), the participants in the international multilateral trade system might consider an approach to disputes and rule application that allows some modified means of direct access to procedures by individuals and private firms, perhaps after an appropriate international "filter" to prevent spurious complaints." id. at 76-77.
272. J. Tumlrir, Protectionism - Trade Policy in Democratic Societies, Wash. D.C., American Enterprise Institute (1985), at 62.
273. Id.
274. Id.
275. Id.
276. See supra, Part I, §1.2.1.1.
277. Hufbauer & Schott, supra, note 235, at 64.
278. See supra, Part I, Introduction 3.
279. Tumlrir, supra, note 272, at 71.
280. Id.
281. The equivalent of a so-called "federally cognizable benefit" in the context of the United States ; or of a "mandatory requirement recognized by EEC law" in the context of EEC law ; see supra, Part II, §2.2.

282. A similar use of the case law of other states is made by the supreme courts of the states within the United States. It tends to be the same in Europe.
283. See supra, §3.1.3.2.
284. Id.
285. See supra, §3.1.3.2.
286. This approach would fall within the category of so-called "Protocol approach" to the creation of international regimes ; see supra, notes 147 to 150 and accompanying text.
- 287 See supra, §3.1.3.2. During the Uruguay Round of negotiations, while many US special-interest groups have worked to limit competition from overseas (including textile manufacturers, dairy farmers, peanut and sugar growers, that would loose their protected position under tougher international trade laws), many others have been pushing to open barriers and save the trade package. For example, American Express Co. and Citicorp have led a drive to liberalize trade in financial services. See The Wall Street Journal Europe, issue of November 30-December 1 ; 1990, If GATT Talks Fail, There's Likely to Be Plenty of Blame for All. With regards to japanese exporters, they have not been willing to ditch domestic lobbies ; see The Economist's, issue of April 6, 1991, The task for Japan's exporters. According to The Economist's, this is for two reasons which will disappear : "One reason is that, so far, Japanese firms have rarely been hurt by protectionism abroad. "Voluntary restraints" on cars and semiconductors merely raised prices and profit margins on Japanese exports. But even protectionists cannot be relied on to remain stupid forever ; if GATT trumbles, the barriers that will rise in its place will be tougher. The other reason is that Japanese exporters have only just become real multinationals ... (...) They need access, it is under threat, and an initiative by Japan could make all the difference in the trading world". Id. With regards to European industrialists, Arthur Dunkel, who heads the GATT, complained that while a variety of U.S. special interests compete for influence in the U.S., "in the EC, one sector [agriculture] seems to outweigh all others" ; in The Wall Street Journal Europe, issue of May 15, 1991, GATT Chief Scolds, Pleads In Bid to End Trade Impasse. On the role of agriculture in blocking the Uruguay Round of negotiations and on the need to harness European pro-trade forces to make the necessary reform of the European Common Agricultural policy, see infra, §3.2.3(3).

288. Already during the Uruguay Round, the countries composing the G7 - four of them (Britain, France, Germany and Italy) formally represented by the European Community - regularly met to eliminate deadlocks in the negotiations in the so-called Quadrilateral Group. See, for example, The Financial Times, issue of September 16, 1991.
289. See supra, Part I, note 328 to 331 and accompanying text.
290. Tumliir, supra, note --, at 62 ; the European Economic Community is here considered as one country, the percentage of world imports being expressed net of intra-Community exchange.
291. Id.
292. Id. According to Bergsten, international relations will look very different by 2000 because of three global transformations which are well under way : First, the end of the cold war ; second, economics will move much closer to the top of the global agenda ; third, the world-economy will complete its evolution from the American-dominated regime of the first postwar generation to a state of U.S.-European-Japanese "tripolarity" ; see Bergsten, supra, note 196, at 96.
- "International relations will look very different by 2000 as a result of these transformations. The hierarchy of nations will shift considerably. The Big Three of economics will supplant the Big Two of nuclear competition as the powers that will shape much of the 21st century." id.
293. A US administration official said "we should have had more modest targets on agriculture" ; see in International Herald Tribune, issue of August 9, 1991, Doubts Arise on U.S. Stance at GATT.
294. An OECD Report recently showed that all governments subsidize their farmers, and that the OECD-wide total amount of subsidization was around 300 billion US dollars for 1990 ; see The Wall Street Journal Europe, issue of May 22, 1991. The OECD report showed that, in addition to direct subsidies from the European Community and Member States of nearly \$50 billion in 1990, European consumers paid \$85 billion more for food than they otherwise would have. It figures American farmers received \$47 billion in direct payments, and that American consumers paid \$28 billion more of subsidies. Id.
295. See F. Teulon, La politique agricole commune, P.U.F., Paris (1991) at 114.

296. For Teulon, for example, "les agriculteurs sont incités à produire trop, au-delà des besoins communautaires. C'est ainsi que nombre d'entre eux ont cultivé le maïs, plante très consommatrice en eau, qui entraîne une forte pollution et qui est exportée aux frais du contribuable. Si l'on souhaite soutenir le revenu des agriculteurs, il serait sans doute plus rationnel de leur verser directement les sommes que l'on souhaite leur voir attribuer." see id. at 116. Similarly, the OECD considers that direct payments unrelated to production and aids to rural development would create fewer distortions ; see, e.g. Les Echos, issue of January 5, 1991.
297. The CAP has systematized the national systems of price support created in the inter-war period (in a period of shortages) in countries such as France ; see, Teulon, supra, note 229b, at 21. While such systems were well adapted to increase production (id. at 43) the CAP has prevented the localization of farm production according to relative comparative advantage ; id. at 45.
298. While the monthly tax cost of the CAP was for each European taxpayer of about FF 15 in the early 1980's, it has more than doubled now : the amount paid by each European taxpayer each month to maintain the CAP is of more than FF 30 ; see id. at 65. But this is just a small fraction of the price paid by Europeans, since the cost of the CAP is mostly borne by consumers ; id.
299. See, for example, Teulon who remarks :
- "De fait, ce sont les pays en voie de développement qui font les frais de ces politiques agricoles, protectionnistes sur les marchés intérieurs et agressives sur les marchés mondiaux. Ils ont un accès limité aux marchés agricoles des pays développés et ils sont concurrencés sur leurs propres marchés vivriers par les excédents bradés à vil prix en provenance de la CEE ou des Etats-Unis." In Teulon, supra, note 230, at 83.
300. Apart from the system of deficiency payments, seen below, American farmers receive subsidies to irrigate and to let their lands rest for ecological reasons.
301. See generally Teulon supra, note 296, at 71-84.
302. See id. at 82.
303. See, e.g. The Wall Street Journal Europe, supra, note 229a, which notes that "In France and Germany, where the political left and right are evenly split, the farmers' swing vote carries disproportionate weight."

304. The Economist's wonders :

"What is not explicable is the way that Jacques Delors in Brussels, John Major in London and Helmut Kohl in Bonn have failed to grasp that the needed farm reform is made for the GATT, and that the GATT is a vital reason for farm reform. They could combine the two imperatives to make Europe the force that tugs the Americans and Japanese towards freer trade, rather than remaining a fortress-building reprobate." issue of May 4, 1991, at 20.

305. Mr. MacSharry, the European Community farm commissioner, has elaborated a plan to reform the CAP which would cut prices by 35% over three years and turn to an American-type income-support system. See e.g. The Economist's, issue of July 6, 1991. It has aroused virulent opposition, but there are few alternatives since any option based on price support will encourage farmers to produce more to earn more ; id. However, the plan would increase the farm budget by 4 billion ECUs over 3 years, prior to reduce incurred expenses by 10% a year from 1997 onwards ; see, e.g. Les Echos, issue of July 16, 1991.

306. MacSharry, in the beginning at least, did not admit any connection between his reform and the GATT. He would not want European farmers to think that reform was being undertaken for foreigners ; e.g. The Economist's, issue of May 4, 1991, at 20. However, The Economist's rightly noted that the MacSharry plan could just about bridge the gap at the Uruguay Round of negotiations between the big cut in farm subsidies sought by the Americans and other exporters and the offer made by the European Community ; e.g. The Economist's, issue of July 6, 1991, at 25. Just a few weeks before the MacSharry plan was announced, GATT negotiators succeeded in clarifying ideas on how to reduce government supports for agriculture. They agreed that aid must be reduced in three areas : domestic farm support, border protection and export subsidies. Two basic criteria have been suggested to define which type of domestic support do not distort trade and do not need to be cut : (i) the support must come from a publicly-funded government programme not involving transfers from consumers ; (ii) the support must not boost prices paid to producers.

307. The Community appeared confident during a meeting of the Quadrilateral Group (see supra, note 288) on September 13-14 that its proposed reform of the CAP was allowing GATT talks to be resumed, see e.g. Le Monde, issue of September 15-16. After the same meeting, Carla Hills, the United States Trade Representative, said that progress in

the GATT talks would depend on reform of the European Community's CAP ; e.g. The Financial Times, issue of September 16, 1991.

- 308. See supra, Part I, §1.2.2.
- 309. See supra, Part I, §1.3.
- 310. See, for example, The Financial Times, issue of September 18, 1991.
- 311. As noted by The Wall Street Journal Europe, "Farmers, one of the most politically powerful interest groups in Europe, have dominated the trade debate in recent months. (...) Although dozens of European Industries - such as financial services companies and pharmaceutical concerns - had much to gain from a successful outcome of the trade talks, the farmers' interest ended up dominating the talks. (...) Mr. Dunkel [who heads the GATT] called on manufacturing and service sectors in Europe, as well as European consumers, to make themselves heard more on trade issues." see issue of May 15, 1991.
- 312. The International Herald Tribune remarked that "... large scale reduction in farm subsidies must be included to provide an incentive for less-developed countries to participate in the 108-nation talks. Industrial countries want poor countries to protect Western patents and copyrights and to lower their barriers to investment and financial services. "Our problem in getting access for our financial institutions in other countries are far less with the U.K. and far more with Malaysia, Indonesia, Brazil and Argentina," the trade representative, Carla A. Hils, said in a recent interview. "And so if you want to keep those countries, the latter group, at the bargaining table, you have to deal with what if of interest for them - and what is of interest for them is liberalization of agriculture". in issue of August 9, 1991.
- 313. As soon as the impasse on agriculture seemed to have been resolved, a meeting of the countries principally interested in liberalizing trade in textiles and clothing was called by A. Dunkel ; see, e.g. The Financial Times, issue of February 21, 1991.
- 314. See in Oxley, supra, note 196, at 33-34.
- 315. Id. at 42.
- 316. For a description of the bargaining position of the most important actors in the Uruguay Round of negotiations, see Oxley's recent work, id.

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